THE DEVELOPMENT OF FAMILY MEDIATION: PRACTITIONER PERSPECTIVES ON EDUCATION

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PhD 1992 - UNIVERSITY OF LONDON

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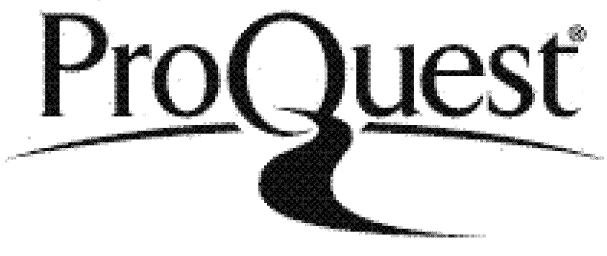

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The Development of Family Mediation: Practitioner Perspectives on Education
Summary

This study explores the education and training required of family-law mediators as well as professional obstacles to further educational developments in the field. The interdisciplinary disputes occurring within the emergent family-mediation discipline and the issues of existing mediator education, the attitudes of family lawyers and mediators towards one another, and mediation's professionalization process, are examined through the eyes of mediators and family-lawyers practising in Greater London in 1987 and 1988.

The basis for this study and its conclusions are: one hundred two extensive interviews with practising mediators; twenty interviews with advisors and senior representatives of all seventeen mediation services; seventeen interviews with registrars and court officials; eighty-eight responses to mediator questionnaires; one hundred fifty-three responses to solicitor questionnaires; visits to thirty-one mediation locations; and observation of sixty-one actual mediation sessions.

The most important theoretical divisions among the mediation practitioners revolved around disputant autonomy, child advocacy, and therapy: the majority argued the importance to mediation of the first of these and the inappropriateness of the second and third. The study isolates and explores these divisions. Most practitioners isolated respect for disputant autonomy and conflict-resolution skills as the core attributes needed by mediators.

Both the lawyers and non-lawyer mediators expressed reservations about the ability of others to engage in mediation. Most did not suggest limiting mediation to members of their own discipline. The study reveals the lack of justification for such limitations and suggests, instead, the importance of the mediator's personal characteristics.

The study also reveals the educational short-comings of the practising mediators and the problematic tendency of untrained mediators to rely on methods emended from other disciplines. Both lawyers and mediators suggested fundamental changes and improvements in the education and training of family mediators.

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CHAPTER 1

Introduction and Overview of the Research[1]

Introduction

This study explores, through the eyes of practising professionals, the education and training needed to practice family mediation, as well as some of the professional obstacles to educational developments in the field. The mediation-practitioners' comments will enable us to isolate the goals and boundaries of the mediation process, identify the central norms of mediation, and define the differences between mediation and other 'professional' endeavors. We shall find that one norm - respect for disputant autonomy - was central to all discussions. It affected the mediators' attitudes towards family therapy and child advocacy in mediation; it affected the type of mediation advocated; and it determined, therefore, the education and training that the mediators thought necessary to provide the service. We shall find that practitioner attitudes towards disputant autonomy, family therapy, and child advocacy had considerable effect on the type of mediation advocated. These attitudes appeared to influence the nature of the mediation advocated more than did mediator attitudes towards or connections to the judiciary or the courts.[2] This study will suggest the need for researchers studying mediation services to include an examination of the former variables as well as service connections to the courts, if final conclusions are to be made. In addition to these

1 This study of mediation services in Greater London was conducted with the permission of the Lord Chancellors' Department. For this I am grateful.

2 See also R. Dingwall and D. Greatbatch, as quoted in Family Law Vol. 20 (1990): 410. In the past researchers in England have compared 'in-court' to 'out-of-court' mediation services, or services having close connections to the judiciary to those without close connections. See, for example, the Report of the Conciliation Project Unit of the University of Newcastle-Upon-Tyne (hereafter called 'The Newcastle Report') and the G. Davis et. al. studies.

matters, the study explores other related issues such as: the thoroughness of the mediators' own education; mediation's professionalization process; and mediator attitudes towards collateral professions. Throughout our discussions we shall compare and contrast the practising mediators' perceptions with those of practising family lawyers.[3]

At the moment professionals in North America and the United Kingdom are enthusiastic about mediation. Dissatisfaction with the legal system and its ability to deal with social and inter-personal conflict thoroughly, inexpensively, and efficiently, and with the helping professions and their abilities to cure social, familial, and psychological problems, have led to a search for alternatives. Mediation, because it is based on respect for the knowledge and perspectives of non-professionals and because it encourages self-help, individual autonomy, and responsibility, appears to provide some of the answers. Thus we now find a multitude of mediation services offering assistance in community, commercial, labour, international, criminal, negligence, landlord-tenant, property, medical, school, or family-law disputes.

Within the family mediation field the numbers and types of mediation services are also multiplying. Family mediation services now offer assistance to families in legal disputes over the future care and upbringing of their children, disputes over the division and disposition of the family's property and financial resources; disputes about the care of the elderly; disputes between parents (or children) and child protection agencies, between parents and children, between grandparents and parents; disputes arising from allegations of abuse, incompetency, and violence. Members of the judiciary, lawyers, court personnel, social-workers, psychologists, marital counsellors, family therapists, religious leaders, government agencies, non-profit agencies, and charities all claim to be offering family mediation.[4] Not surprisingly, given the diverse backgrounds of the

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3 The term 'lawyer' when used in this study will include any or all of: barristers, solicitors, attorneys, legal executives or para-legals as the context requires.

4 These are the largest groups. Occasionally we also find other disciplines involved, for example: sociologists, anthropologists, educators, nurses.

practitioners involved, we find great diversity in the styles of service offered. Family mediators variously see disputing family members separately, separately and together, only together, together with each other and then together with their children, only together with their children, or in groups with other disputants. Lawyers are sometimes included in the process as co-mediators, sometimes as independent advisors, sometimes not at all. Practising mediators work singly, in pairs, or in teams. Some offer disputants comfortable, informal surroundings, others employ the use tape recorders, video cameras, and viewing teams. Some work with mediators of the opposite sex to create gender balance, others work with professionals from other disciplines to offer broad professional expertise. Many family mediation services offer mediation as an independent, confidential service. Others offer mediation as part of an enforced decision-making process wherein mediators write reports, make recommendations, and even render decisions should disputing family members be unable to agree. Some services operate as part of the court process, others are independent of the courts; some are mandatory, others entirely voluntary. Finally, (and most important) different family mediation services appear to have different goals. Some services offer families child advocacy, others offer therapy or relationship assistance, others offer directed settlement, still others offer non-directive-conflict-resolution. This variation in practice and professional perspective has made it difficult or well-nigh impossible to isolate the educational requirements of family mediators. Mediation services, consequently, have multiplied before the discipline has been able to attain consensus or to regulate the education and training of its practitioners.

Family mediation appears to have begun its phenomenal growth in response to professional dissatisfaction with the adversarial process and with the services offered by lawyers and other professionals, rather than in response to public demand.[5]

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5 Most mediation services, excluding those that are attached to the courts and are involuntary, have difficulty generating clients. See chapter 10.

Consequently, with the multiplication of mediation services, we encounter professional demand for access to mediation clients. Governments have responded by passing legislation encouraging mediation; the legal system has responded by attempting to integrate mandatory-mediatory processes in the adversarial process. In some jurisdictions we now find laws requiring lawyers to inform clients of the benefits of mediation. A multitude of court processes now encourage settlement: pre-trial reviews, settlement conferences, welfare enquiries, and mediation services attached to the courts. Many legal jurisdictions now require families to engage in mediation and restrict, through legislation or judicial practice, families' access to the courts until they have done so. The very system of family law appears to have shifted focus. Settlement has replaced reconciliation, investigation, and judicial scrutiny - again with little thought of the education that mediators would need to help disputants arrive at equitable, long-term solutions to their problems and with little thought to the potential dangers of court involvement in informal settlement processes.

As politicians, lawyers, and the courts search for alternatives to an expensive, tension-laden, litigation process, counsellors, social workers, family therapists and psychologists (mental-health professionals) seek expansion of their role from assisting the minority of troubled families with the emotional components of divorce to a more central role of assisting the majority. Mental-health professionals have become frustrated by what they perceive to be the adversarial system's obstruction of their efforts to assist their clients through the emotional stages of the divorce process. Their experience leads them to believe that the legal process exacerbates conflict[6] and so

6 For some examples of assertions by those who work in the mental health field that lawyers and the adversarial system exacerbate conflict, see: J. Earnshaw (1987): 1,2; M. Elkin (1987): 20; J. Howard and G. Shepherd (1987): 4; H. Irving and M. Benjamin (1987): 39; H. Irving and B. Schlesinger (1978): 79; National Marriage Guidance Council (1982): 107.

Whether this perception is true or not is another matter. We need more information about what lawyers and judges actually do. The current research suggests that the perception is inaccurate: that lawyers in the adversarial process do not in fact exacerbate conflict. For further discussion see Chapter 9.

Perhaps people tend to engage in legal processes when their tension and conflict levels are high, which makes it appear that the legal system causes the problem. It is also probable that the mental-health

hinders the progress of their clients. Consequently they wish to expand their role into the whole of the legal and emotional dispute-resolution process.[7] At the same time family lawyers have become disillusioned with the capacity of the adversarial process to deal effectively with the entirety of their clients' family problems.[8] Consequently they also are seeking an expansion of their role through the acquisition of mental health and counselling skills.[9] Mediation appears to offer an avenue by which both professional groups can expand.

Mediation proponents lobby governments for funding and for access to clients. Their united front conceals some very serious divisions. To date there has been no firm agreement about mediation's goals and methods, nor about the education and training which should be required of those who would seek to provide it.[10] Mediators who are lawyers, social workers, family therapists, or court-welfare officers are not always seeking the same ends, nor do they always share similar world views.[11] This should not be surprising, given the differences in their education and training, and given the fact that they have derived their professional experiences from different client groups. Social workers, psychologists and family therapists tend to work with individuals and

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professionals are partly right. Perhaps the adversarial system and lawyers fail the type of clients that mental-health professionals normally encounter.

7 It would not be particularly helpful to list all of the articles and books written by mental health professionals who claim that they have better methods to resolve family-law disputes than those offered by the lawyers and the adversarial process. I have therefore listed here only some examples drawn from the mediation literature: F. Bienenfeld (1983): 3; E. Brown (1986); Family Mediation Canada (1985): 2 to 4; Frontenac Family Referral Service (1984): 2; Howard and Shepherd (1987): E. R. Hulbert (1987): 79; 8; Irving and Schlesinger (1978): 80-90; Irving and Benjamin (1987); L. Parkinson (1983b): 22.

8 For example see: Department of Justice (Canada) (1984): 3; J. Folberg and A Taylor (1984); C. Micka (1985): 95; Report of the Matrimonial Causes Procedure Committee (1985): 17; S. Roberts (1979): 20-21; J. Ryan (1986): 105.

9 The Solicitors Family Law Association (SFLA) in England has been running a series of workshops for solicitors on counselling skills, psychological aspects of divorce, dispute resolution, for examples, see: Family Law 17 (1987): 294. Law Schools are also expanding their academic programmes in this direction, see: L. Riskin (1982): 56; C. Savage (1989); N. Zaal (1985): 552.

10 F. Bienenfeld (1983): 7; B. Cantwell 1986): 278; J. Fargo (1986): 3; L. Kiely and D. Crary (1986): 41; E. Koopman (1984): 2; H. McIsaac (1983): 50; J. Orbeton (1987); J. Pearson, M. L. Ring and A. Milne (1983): 18; J. Ryan (1987b): 281; J. Walker (1989): 30.

11 Department of Justice (Canada) (1988b): 165-169; L. Marlow (1987): 86-88; I. Thery (1986): 344-357; N. Tyndall (1982): 118.

families who have had the greatest social or emotional difficulty with the separation process[12], lawyers work with the majority, most of whom are at the other end of the continuum of emotional damage. Each professional group tends to define the separating or divorcing public in terms of its own educational and professional experiences. Consequently, each has trouble understanding the others' objectives and concerns.

These professional interests threaten the academic development of mediation. Each professional group seeks to entrench knowledge, methods, and techniques drawn from its own sphere of influence.[13] We shall look at some of the consequences of this in Appendix A-1, and in chapters 3, 4, 5, 6, 11 and 12. We shall see that attempts to integrate prior 'professional' practices into mediation can create processes that have little in common with each other and that have little connection to mediation's central norms. This study suggests that, if mediators do not receive specialized training in mediation, they continue to rely on old methods and practices. Thus researchers who study the mediation services of counsellors, therapists, or lawyers inadequately trained in mediation, run the risk of studying counselling, therapy, or the practice of law rather than mediation.

Herein lies the problem with much of the existing family mediation research. In the rush to validate mediation, and to prove its worth against the adversarial process researchers have forgotten to have the mediators define mediation and how it differs from other processes. Thus, while we have extensive research on consumer perceptions of and responses to mediation, and even more research on agreement rates reached in the process;[14] and while we now have considerable research purporting[15] to compare

12 See, for example, the cases discussed in: M. B. Issacs, B. Montalvo and D. Abelsohn (1986).

13 a) G. Davis (1983a): 6; A. Elwork and M. Smucker (1988): 22; J. Folberg (1983): 12; J. Haynes (1989): 5; M. Knowles (1987): 61; E. Koopman (1984): 3-5; S. Roberts (1983): 551; J. Westcott (1986b): 46.

b) For some examples drawn from those with mental health backgrounds, see: T. Fisher (1986b): 2-3; J. Forster (1982): 43-46; D. Howard (1987); Irving and Benjamin (1987); M. Knowles (1987): 59; J. Lemmon (1985a): 106-109.

c) For some examples from those with legal backgrounds: A. Cornblatt, (1984-5): 104-5; A. Pirie (1985): 380-384; J. Westcott (November 1986): 3347; N. Wilkins (1984): 123.

14 The number of studies prohibits listing them here. The literature containing research on

consumer responses to mediation to consumer responses to the adversarial process,[16] and comparing the costs of mediation to the costs of legal proceedings;[17] and while we have research comparing agreement rates reached in mediation to agreement rates reached in other processes, research on lawyers' attitudes to mediation[18] and research on consumer' attitudes to lawyers;[19] and while we have research on the type of disputants who benefit from mediation,[20] on the factors that inhibit and encourage settlement,21 and comparative research on court-connected and independent mediation services;[22] and while we are beginning to find researchers examining family mediation processes;[23] few

consumers' attitudes to family mediation and or on agreement rates in mediation had been noted with a '*' in the bibliography.

15 It is difficult to determine the validity of most of these studies because of differences between the clients engaging in mediation and the clients using the adversarial process who were included for comparison. For further discussion, see chapter 9.

16 For example: B. Bautz (1988); B. Bautz and R. Hill (1989); G. Davis and K. Bader (1983d): 12; Department of Justice (Canada) (1988a,b,c); K. Dunlop (1984); R. Emery and J. Jackson (1989); J. Kelly (1989); J. Kelly, L. Gigy and S. Hausman (1988); C. McEwen and R. Maiman (1984); A. Milne (1978) 5; Pearson and Thoennes (1984b), (1984d), (1985a), (1988a), (1988b).

17 For example: B. Bautz and R. Hill (1989); the Newcastle Report; G. Davis and K. Bader (1983d): 12; Department of Justice (Canada) (1988a): 40; J. Pearson and N. Thoennes (1984d): 507.

18 For example: A. Bradshaw (1986); A. Bradshaw, J. Pottinger, M. L. Bowen, and P. Burke (1985); G. Davis (1982b); G. Davis and M. Murch (1988); H. Irving and M. Benjamin (1983): 275; E. Koopman, E. J. Hunt, F. Favretto, L. Coltri and T. Britten (1991); Newcastle Report.

19 For example: Cavenaugh and Rhode (1976); G. Davis (1988a): 86; Department of Justice (1988a): 27; H. Erlanger, E. Chambliss, and M. Melli (1987); K. Gersick (1974); A. Hochberg (1984), J. Kelly (1989); Mitchell (1981); M. Murch (1980); Newcastle Report (1989); J. Pearson and N. Theonnes (1988a): 78; G. Spanier and L. Thompson (1984).

20 See, footnote 21.

21 See, for example: J. Bercovitch (1984); G. Bierbrauer, J. Falke and K. Koch (1978): 75-9; D. Brookmire and F. Sistrunk (1980): 323-6; C. Camplair and A. Stolberg (1990): 205-11; P. Carnevale, R. Lim and M. McLaughlin (1989); G. Davis and K. Bader; W. Donohue (1989); W. Donohue, M. Allen, and N. Burrell (1985); W. Donohue, J. Lyles and R. Rogan (1989); W. Donohue and D. Weider-Hatfield (1988); J. Hiltrop (1989); H. Irving and M. Benjamin (1983): 280, (1987): 236; H. Irving, M. Benjamin, P. Bohm, and G. MacDonald (1981); J. Kelly and L. Gigy (1988), (1989); J. Kelly, L. Gigy and S. Hausman (1988); T. Kochan and T. Jick (1978); K. Kressel (1985): 226; K. Johnson (1984): 33-5; J. Pearson and N. Thoennes (1985a): 462, (1989); D. Pruitt, N. McGillicuddy, G. Welton and W. Fry (1989): 388-9; H. Raiffa (1982); Newcastle Report (1989): 185; S. Rogers and C. Francy (1988); K. Slaikeu, R. Culler, J. Pearson and N. Thoennes (1985); K. Slaikeu, J. Pearson and N. Thoennes; D. Sprenkle and S. Storm (1981): 194-209; S. Zemmelman, S. Steinman, and T. Knoblauch: 36-7.

22 See, for example: Department of Justice (Canada) (1988) studies and the Newcastle Report (1989).

23 See, for example: P. Carnevale, R. Lim and M. McLaughlin (1989); R. Dingwall and D. Greatbatch (1991); W. Donohue (1989); W. Donohue, M. Allen and N. Burrell (1985), (1989); W. Donohue, J. Lyles, and R. Rogan (1989); W. Donohue, and D. Weider-Hatfield (1988); A. Garcia (1990); D. Greatbatch and R. Dingwall (1990); C. Piper (1988); K. Slaikeu, R. Culler, J. Pearson, and N. Thoennes (1985); K. Slaikeu, J. Pearson, J. Luckett, and F. Myers (1985); K. Slaikeu, J. Pearson and N. Thoennes

attempts have been made to isolate the fundamentals of mediation and the education and training needed to carry it out. Educational issues, with the exception of the work of E. Koopman, have been largely ignored. Researchers, consequently, have not been able to provide an assurance that the mediators they have been studying have been practising mediation and not something else. For the most part researchers have also ignored or at best given cursory treatment to the theoretical and professional perspectives of mediation practitioners.[24]

It seems appropriate at this stage in mediation's development in England to explore, isolate and identify the nature of mediation as understood by its practitioners, and to explore the areas of division and consensus. This study is, therefore, exploratory, analytical and descriptive rather than empirical. It was begun with the conviction that, until mediation is identified clearly and until those delivering the process are trained to deliver it, consumer evaluations will be misleading. The fact that clients going to facility 'A' liked mediation more than clients going to facilities 'B' and 'C' does not tell us much about mediation if 'A' provides counselling, 'B' therapy, and 'C' legal services. Nor does research showing that those who have been through the adversarial process achieve equal or better results than those who have been through mediation,[25] tell us much about the viability of mediation if one service is provided by highly trained lawyers and the other by those with limited mediation education, training, and experience. This study lends support to the preliminary conviction. We

(1988); V. Wall and M. Dewhurst (1991).

24 For an exception see: J. Bercovitch (1984).

25 Newcastle Report (1989): 190-256, the Department of Justice (Canada) studies (1988), and E. A. Lind and R. Maccoun et. al. (1990). Most of the other studies indicate that mediation is superior to the adversarial system as a process but the comparisons are not reliable because of the differences in the criteria used to gather people into the two groups. For example: J. Kelly (1989) compares 12% of those who had been through the adversarial process who had agreed to participate in the study, whether they had reached agreement in the adversarial process or not, to 57% of those who had voluntarily chosen mediation and had successfully reached an agreement. J. Pearson and N. Thoennes (1984) omitted 64% of the adversarial system comparison group for various reasons, including 26% because they had reached agreement. Similarly H. Irving and M. Benjamin et. al. (1981) selected for inclusion in the group of mediation clients studied only those disputants who met certain conditions. The same conditions were not imposed on the adversarial clients studied.

shall find that, in the absence of specialized training, practising mediators tend to rely on methods and perspectives drawn from disciplines learned earlier.

If divorce mediation is truly different from therapy,[26] counselling,[27] and the practice of law,[28] as most of mediation's proponents suggest, and if it is not to succumb to these disciplinary divisions, it will have to identify and separate the knowledge, education, and training needed for mediation from that needed to perform other professional activities. It is not possible to begin this process without isolating the essential components of mediation and the mediator's role within the process. This study invites those with practical experience in the field - the mediators and the family-lawyers - to begin to unravel these components and the education and training needed to perform the service.

As we explore the views of practising mediators, we shall contrast their views with those of practising family lawyers. Some might question the validity of soliciting the opinions of practising lawyers about the education and training needed to practice mediation. There were four reasons for doing so. First, lawyers are one of the most important sources of clients for family conciliation/mediation services.[29] Barring the development of involuntary mediation/conciliation, lawyers will have to be satisfied with the education and training of mediators if they are to give mediators/conciliators

26 Authors who have distinguished mediation from therapy: E. Beal (1985): 22-23; D. Brown (1982): 30; E. Brown (1988): 131-132; G. Davis and M. Roberts (1988): 8; J. Kelly (1983): 33; P. Maida (1986): 59; A. Milne (1984): 55-56, (1985a): 3-13; A. Milne and J. Folberg (1988): 7-8; C. Moore (1986): 3; M. Roberts (1988): 12-18; M. Robinson (1986); A. Taylor (1981): 2; J. Weaver (1986): 74.

27 Authors who have distinguished mediation from counselling, see, for example: M. Baker-Jackson et. al. (1984): 23-4; D. Brown (1982): 30; Department of Justice, Canada (1988d): 8; T. Fisher (1986a): 17; B. Landau, M. Bartoletti and R. Mesbur (1987), 19; A. Milne (1983): 22: "[while] the therapeutic practice can benefit the couple, we may have to refer to it as divorce counselling in order to differentiate it from mediation, where the goal is not to resolve relational and psychological issues but to assist the couples in reaching an agreement on finances, property, custody and visitation.", A. Milne (1985a): 1; L. Parkinson (1985c): 217-218.

28 For some authors who have distinguished mediation from what lawyers already do, see: D. Brown (1982): 1; G. Davis (1988a): 57, 117, 125; M. Eisenberg (1976): 637; J. Folberg (1985): 419-420; P. H. Gulliver (1979): 13; E. Koopman and E. Joan Hunt (1988): 384; H. McIsaac (1983): 49; L. Neilson (1990): 237-238; S. Roberts (1983): 537; J. Ryan (1986): 105; F. Sander (1983): 5-7; S. Spitzer (1982): 174.

29 The out-of-court mediation services in Greater London reported a dependance on solicitors for clients. See also: Newcastle Report (1989): 100.

access to clients. Second, prior to the development of mediation/conciliation services, lawyers were the only professionals involved in the resolution of family-law conflicts. They can, therefore, draw upon a great wealth of expertise in that field. Third, this study will show that the practising mediators lacked education, training, and experience in legal and financial matters. Fourth, although in 1987 very few of the mediators practising in Greater London were lawyers, the situation appeared likely to change and indeed has done so. Lawyers in England are increasingly becoming involved in mediation, primarily under the auspices of the Family Mediators Association (FMA), an association of professionals committed to training lawyers and mental-health professionals to work as a team in mediation practice. For all of these reasons, it proved useful to be able to compare and contrast the views of practising mediators to those of practising family lawyers.

If we are to properly evaluate the practising lawyers' and mediators' proposals, we need to know something about them. In particular, we need to have knowledge of their professional backgrounds, education, training, and of the quality of their legal and mediation experiences. These matters are explored in chapters 2 and 3 and in Appendix A-1.[30] In chapters 4, 5, and 6 we explore with the mediation practitioners the goals and parameters of the mediation process. We shall find that the practitioners' suggestions for mediator education and training were shaped by the relative weights that they assigned to certain key mediation goals and perspectives: the mediator as the professional expert versus the right of families to autonomy and self-determination; the protection of the interests of children versus the protection of the rights of families to make their own decisions; and the treatment of family dysfunction versus dispute- and conflict-resolution. In chapter 6 we conclude our examination of the parameters of the mediation process with an analysis of the place of therapy in mediation. In addition to

30 Appendix A-1 is a detailed description of the mediation services. For interview and questionnaire particulars, see Appendices A-2, A-3, and A-4.

gaining an appreciation of the practitioners' understandings of mediation, we also needed to know the types of substantive issues that the mediators contemplated mediating. Thus, in chapter 7, we examine the practitioners' perspectives on property and financial mediation. The types of students that the mediators contemplated training are explored in chapters 8 and 9: personal attributes in chapter 8, professional attributes in chapter 9. As part of our discussions, we also explore the inter-disciplinary conflicts occurring in family mediation and the advantages and disadvantages of various professional backgrounds for mediation practice. In chapter 10 we explore mediation's professionalization process and the goals of mediation training. Chapters 11, 12, and 13 are devoted to the practitioners' recommendations for the content of mediator's training from the conflict-resolution, legal, social-work/mental-health disciplines. The mediators' and lawyers' opinions about the adequacy of mediator training and suggestions for future course structures and durations are examined in chapter 14.

Generally, we shall find that, while Greater London's practising mediators were making efforts to upgrade their education, at the time of the survey many had training that was inadequate for the practice of mediation, particularly for the practice of global or financial and property mediation. The mediators were particularly weak in law and needed also to upgrade their knowledge of conflict-resolution. Because they lacked extensive specialized training, the mediators tended to rely on old social-work and mental-health skills and techniques emended to suite mediation. This study suggests that inadequately prepared mediators will tend use methods in mediation that are distinguishable along disciplinary lines.

If mediation is to attain disciplinary, much less professional status, this diversity must be addressed. Both the family lawyers and the practising mediators were concerned about educational problems in mediation's development. The members of both disciplines recommended training programmes for family mediators of considerably longer duration than most of those available to mediators today.

Despite their own educational shortcomings, the majority of the practising mediators had little difficulty isolating the parameters of mediation and distinguishing it from the endeavors of the collateral disciplines: law, social work, counselling, and family therapy. Furthermore, the practising mediators' educational suggestions appeared to be firmly connected to the requirements of the mediation process that they isolated. The family lawyers were less clear, appearing to consider mediation a directive process. Contrary to this view we shall conclude that respect for disputant autonomy is a central to mediation and that it ought to be at the heart of all mediator training.

Overview Of Research

Our study solicits the views of practising mediators and family lawyers.[31] For our purposes the biases, perceptions, and understandings of the practising professionals are more important than their actual practices, hence our concentration on interview data. The study does not rely solely on interview data, however. Interview data is integrated with information gained from observation of live mediation sessions, observations of mediation facilities, and from questionnaire surveys.

Between November 1986 and October 1987 interviews (of an average duration of 1.5 hours) were conducted with the heads and advisors of all 17 formally-constituted mediation services operating in Greater London.[32] The 17 mediation services, and the 113 mediators who worked in them, were chosen for this study on the basis of public representations and perceptions that they were offering divorce and family mediation to the public. Chapters 3, 5, and 6 and Appendix A-1 reveal, however, fundamental

31 Attention was not focused on the opinions of mediator trainers or educators lest their answers reflect vested interests in existing programmes: see E. Koopman (1985a) for indications of this trend. Nor were the views of mediation clients solicited as it was assumed that mediation clients would not, as a general rule, have enough exposure either to mediation or to the education and training of mediators to properly evaluate the issue.

32 All formally constituted family and divorce mediation services were included. Not included were services which may have offered dispute- or conflict-resolution as part of other professional endeavors; or which did not specialize in family or divorce mediation. Nor, with one exception, were the mediation services of non-specialist probation agencies included. For particulars and further details, see chapter 3 and Appendix A-1.

differences among them. The processes offered by one service sometimes bore little resemblance to the processes offered by another. This study will suggest that these differences were a reflection of the mediators' inadequate specialized education and training in mediation, which caused the practitioners to rely on perspectives and methods drawn from other disciplines.

The mediation service interviews were structured and open-ended. The interviews were designed to elicit information about the type of conciliation/mediation services available to the public in Greater London.[33] They were tape recorded[34] and later transcribed in full. Fourteen of the service interviews were conducted with the administrators, chief officers, or heads of the agencies; four with agency advisors; two with senior staff members.[35] Some of the mediation services had more than one office, consequently twenty-three offices and eight courts were visited in order to inspect first-hand the mediation facilities.[36] Information about the mediation services was updated by means of further interviews during the summer of 1988.

Extensive interviews (of an average duration of 2.5 hours) were also conducted with 102 of the 113 practising mediators[37] working in Greater London in 1987. The interviews followed a structured but open-ended question format and focused on professional problems in the development of mediation, particularly on matters relating to education and training.[38] With two partial exceptions, all interviews were tape-

33 The mediation practitioners were also asked for particulars of the mediation services they were offering. The service interviews were designed to elicit information about the services: their structures, their clients, and their mediation policies rather than comments about individual practice.

34 Three of the interviews with the heads of the conciliation/mediation services were not recorded. Instead notes were kept during the interview and expanded from memory immediately thereafter. Quotations are not, of course, taken from those interviews although I have relied on them for information. All three of the interviewees were re-interviewed as practising conciliators later in 1987, during the course of the study. In all cases the second interviews were tape recorded and later transcribed.

35 In three agencies I interviewed more than one head, advisor, or administrator.

36 Four of the mediation services operated from a number of locations.

37 Six mediators were not contacted for interviews: four because they only worked as court-welfare officers on a part-time basis and the full time officers in their units had been interviewed, and two because they had health problems and were inactive. Another six declined the interview for a variety of reasons.

38 The interview structure can be examined in Appendix A-2. The exact wording and timing of

recorded,[39] transcribed in full onto index cards, and filed and cross-indexed by subject matter. Transcribing the interviews in full allowed categorization and cross-indexing of the practitioners' comments without loss of reservations, specifications, qualifications, and changes of mind. It also permitted cross-checking practitioner comments on several subjects at once to verify meanings and nuances. In addition to being interviewed, each mediator was asked to complete a five page questionnaire (see Appendix A-3) concerning his or her own professional experiences, education, and training. Eighty-eight (86.3% of those interviewed, 77.9% of the total number of mediators) did so.

This study is also based on personal observation of sixty-one conciliation/mediation sessions or appointments. Most of these were in-court sessions conducted before registrars in the eight divorce courts[40] which offered formally scheduled family mediation or conciliation appointments in Greater London during 1987. For purposes of comparison, several directions appointments[41] were also observed in one divorce court that did not offer conciliation/mediation. Finally, the mediator portion of the study draws upon interviews with fifteen registrars, a court clerk, and one judge in the courts studied,[42] and upon participant observation in seven conciliation/mediation workshops and case consultations with practising mediators.

In addition to obtaining information from the mediators and from

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questions was sometimes altered to suite the content and flow of the individual interview. Occasionally a question was missed inadvertently; or was not asked if it became clear the question would be inappropriate, given the interviewee's other responses; or if there were time constraints.

39 One partial interview was not taped because of a problem with the recording machine. The problem was discovered within an hour of the interview and notes made from memory at that point. Another partial interview was not taped at the request of the interviewee. Notes were made during the interview and several hours later expanded from memory. All quotes are taken from transcribed tapes.

40 With one exception, Magistrates courts and probation services were not included in the survey.

41 Pre-trial appointments held before a member of the judiciary to give lawyers and their clients directions on how to proceed to get their case ready for trial.

42 These interviews were relatively informal. I did not follow any particular question sequence. These figures do not include an informal meeting with judges and registrars at Croyden County Court (see: Services Not Covered, Chapter 3). In 1987 most of the Croyden County Court's mediation services were being provided off the court premises by the Family Conciliation Bureau at Bromley. That service is described in Appendix A-1.

professionals connected to mediation services about the type of education and training that family mediators should have, the opinions and views of family-law practitioners were solicited by questionnaire.[43] The members of the Solicitors' Family Law Association (SFLA) working in Greater London were chosen for the survey of lawyers since it was expected that they would be able to give informed legal opinions about the education and training needed to mediate family law disputes. Most SFLA members are family law specialists and all profess adherence to the non-adversarial practice of family law.[44] Furthermore, all those surveyed were practising within the boundaries of Greater London, which at the time of the survey contained the seventeen conciliation/mediation services included in the mediator survey. Thus the members of this organization were considered to have enough familiarity with the concept of mediation and enough sympathy with its basic tenets to be able to give well-reasoned and informed opinions.

All SFLA members who practised in Greater London[45] and whose names appeared on the SFLA membership list on the 22nd July 1987 were surveyed during the summer and fall of 1987 by means of a seven-page questionnaire.[46] All of the lawyers' questionnaires were numbered so that all those who did not respond within one month could be contacted again by means of a hand-written, personal letter. The solicitors were invited, on the face of the questionnaire, to indicate their interest in receiving the

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43 a) See Appendix A-4.

b) The results of this survey of family lawyers first appeared in the International Journal Of Law And The Family Vol. 4, (1990): 235-265.

c) The questionnaire used for this survey was submitted in preliminary form to the members of the Conciliation Committee of the Solicitors' Family Law Association (SFLA) for criticism. I wish to extend warm thanks to all members of that committee for their many helpful comments and suggestions. I also wish to thank all the members of the SFLA for the time and effort they expended in assisting with my research. Many solicitors not only completed the questionnaire but also took extra time to add extensive comments.

44 'Solicitor's Family Law Association Code of Practice' (June 1984): 156.

45 The survey included all SFLA solicitors working within Greater London who listed office telephone numbers having the 01 Greater London telephone exchange. This may have excluded some SFLA members in Greater London working in the outlying areas, particularly in Havering and the southern part of Bromley. The telephone exchange boundary was chosen for ease of identification because the SFLA July 1987 membership list listed members alphabetically and not by area.

46 For particulars of the questionnaire and covering letter see Appendix A-4.

results of the survey.[47] Two hundred and sixty-six questionnaires were mailed to all those listed as full members; of these 150 completed questionnaires were returned, giving a response rate of 56.4%.[48] In addition, one solicitor replied to the questionnaire by letter and two more solicitors were interviewed on the same topics. Seven of those not completing the questionnaire replied indicating they had not done so because they were not currently practising family law,[49] and four members could not be located. This gives an adjusted response rate of 60%.

Cautionary Note

Before we begin our exploration of mediation through the eyes of practising professionals, a few words of caution might be in order. While the impressions we shall glean from the mediators' comments are augmented by a limited number of case observations, it is important to remember that when the practitioners made comments about their own mediating behaviour, that behaviour was not usually observed independently. It is possible and even likely that in many cases, in the heat of a mediation session, a conciliator/mediator's actual practice would differ from that described.

H. Irving and M. Benjamin[50] state that what mediators say they do, and what they actually do, may not coincide. There appears to be some support for this view in

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47 With the exception of one solicitor, for whom I had only a partial address, all solicitors who indicated their interest in the results on the questionnaire have been contacted and given the publication particulars or copies of the survey.

48 Additionally, 6 questionnaires were mailed to associate members of the SFLA. Two of these were completed and returned. Associate members are persons interested or involved in family law who are not solicitors. The category includes legal executives, many of whom have extensive family law experience. It also includes some people who are interested in the field but who are not connected with the practice of law. When the list of members was updated prior to final mailing, associates were not included because of the difficulty of determining their appropriateness for the survey. In order not to discount the time and efforts of the two associate members who did respond, their responses have been included with those of the full members, making the total number of questionnaires evaluated 152.

49 A number (4) completed the questionnaire in spite of this, simply leaving out inappropriate questions or giving answers based upon their previous experience from the practice of law.

50 (1987): 232, 247.

the research.[51] D. Pruitt, N. McGillicuddy, G. Welton and W. Fry,[52] for example, found little consistency between what mediators said they did in a particular mediation session and what they actually did. The researchers did, however, find a close correspondence between the ordering of tactics that the mediators as a whole reported using and the ordering of observed mediator tactics over many of the mediation sessions observed. This led the authors to suggest that perhaps mediators tend to report mediation stereotypes or average mediator behavior, based upon their own and others' mediation experience, rather than what happens in a particular session. We must also remember that different people experience the same situation differently. Even if the conciliators and mediators were able accurately to describe their own mediation activities, the disputants participating in these processes may well have understood and described the same activities quite differently. The information provided by the mediators concerning their own ways of working is, therefore, offered to show theoretical orientations or perspectives towards mediation; to illustrate mediation models or styles of practice; or to give theoretical illustrations of sound and unsound mediation practice. It is important to remember that the descriptions offered do not predict or reflect any particular mediators' behaviour in any particular mediation session.

Mediation and Conciliation: The Meaning of the Terms

Prior to turning to an examination of the mediation practitioners' personal, professional, and educational characteristics, we must consider the confusion over the terms 'mediation' and 'conciliation', and identify how the terms are used in this study. There is considerable debate in England about whether or not the two terms refer to the same, to similar, or to different processes. Some claim that 'conciliators' rely heavily on methods drawn from the counselling and therapeutic fields, but that 'mediators' use

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51 W. Pinsof (1981): 713; D. Pruitt, N. McGillicuddy, G. Welton and W. Fry (1989): 384. See also: J. Kingsley (1990): 185

52 D. Pruitt et. al., ibid.

negotiation skills.[53] Others argue that 'conciliation' allows the disputants to retain sole decision making power, but that 'mediation' is closer to arbitration.[54] Still others distinguish between the two processes on the basis of the degree of disputant control, but argue that 'mediation' protects disputant autonomy better than 'conciliation'.[55] Finally, many use the terms interchangeably.[56]

Thus, no firm agreement exists about the differences between mediation and conciliation, nor about the meaning of either term. The comments of the conciliators and mediators practising in Greater London reflected this confusion. Although the structured interviews did not include any direct question on the topic, thirty of the conciliators broached the issue. Of these thirty, twenty used the terms inter-changeably, four distinguished between the two terms on the basis of the issues being disputed, and six offered their own distinctions.

The conciliators/mediators complained about the confusion as follows:

> That depends on what you mean by conciliation. Some people call it one thing, some people something else. I don't know if there is a distinction between conciliation and mediation though I am familiar with both words - or two words used to cover the same thing. A lot of people are jumping on the bandwagon linking it with their pet hobby horse so the family therapy people are saying they are practising conciliation now as I understand it. (court-welfare officer/conciliator)

> I think we should keep mediation and conciliation separate. I find even within the probation service, court-welfare officers and among social services, there is a complete misunderstanding of the differences between conciliation, in-court conciliation, reconciliation and mediation. Within professional circles I would expect them to know ... I find that alarming. There have been papers written about whether there should be a new term for in-court conciliation. My reaction to that is, well let people learn the present vocabulary before introducing a new vocabulary. (court-welfare officer/conciliator)

> You take a more active role as a conciliator. We are helping them to find

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53 For example: C. Moore (1986), 14, 43, 124, 257-259; T. Hipgrove et. al. (1989): 264; L. N. Rangarjan (1985), 260; R. E. Walton (1969), 75.

54 For example: C. Jackson (1986): 357; A. James (1987) 349; J. Kingsley (1989) 202-203; W. Maggiolo (1985), 13; L. Singer (1987): 11; Morris Wolff (1982-1983): 214-215.

55 G. Davis (1988a): 52; G. Davis and M. Roberts (1988): 7.

56 A. Ogus, P. McCarthy and S. Wray (1987): 63; R. McWinney (1988): 38; L. Parkinson (1986): 72; J. Walker (1987a): 34.

> common ground - to compromise. We are helping them to move towards some central area and I could get just a little bit directive by saying, " that seems to be a good idea" or by saying, "well if she is offering that, what can you offer?". I'm not sure whether that is conciliation or mediation or what, but...(court-welfare officer/conciliator)

The minority of practitioners who did attempt to distinguish between the terms did not agree on the distinctions to be used. Four distinguished between the terms on the basis of the issues being considered:

> Mediation, as we have come to use it in this agency, is seeing couples about any issue they want to raise. [It is] not necessarily about the children. If it is conciliation, it is the children you are going to be talking about. (conciliator/mediator)

> Conciliation focuses on the children; mediation on those who have no children, [who] have sorted it out or their children are gone and they just want to divide up the goodies [finances and assets].(conciliator/mediator)

Others distinguished on the basis of the degree of disputant control over the process and others on the duration of the third party's assistance. Still others understood conciliation to be a process which alleviates the emotional aspects of divorce and mediation as negotiation over concrete issues. The remarks of three of the conciliator/mediators may help to illustrate this:

> It is different to me. Mediation feels like business transactions, the disposal of assets - conciliation sounds more about feelings and about relationships. (court-welfare officer/conciliator)

> I suppose I see the conciliator as someone who facilitates and enables the parents to take back responsibility and to help them make decisions which are right for them and their children and not decisions which seem to be right to the courts. [I] certainly see it as a conciliator rather than [as] a mediator. (court-welfare officer/conciliator)

> Yes I do [distinguish between the two terms] because although we say [we do] conciliation, the emphasis - in fact in what we do - because of the limited amount of time we have and perhaps because we are geared to writing a report at the end of it - has more to do with mediation and negotiation than it has to do with conciliation. (court-welfare officer/conciliator)

When we look at Greater London's conciliation/mediation services and the mediators' definitions of the process, we shall find that the processes being described commonly combined elements of all distinctions. Given the current lack of clarity, perhaps we

ought to articulate what is unique about the process before we attempt to make divisions.

Preliminary discussions with lawyers revealed that they, too, used a variety of different definitions for the two terms, but that the distinction they most commonly agreed upon was based on the scope of the issues being disputed: 'conciliation' referred to processes limited to child issues, 'mediation' to processes that went beyond child issues to include negotiations over property and finance. SFLA questionnaire respondents were, therefore, asked to assume that the term 'mediation', when used in their questionnaire, referred to processes including child, property and financial issues, and that the term 'conciliation' referred to processes limited to child issues.[57] We must keep this direction in mind when we evaluate the lawyers' comments and recommendations. We should also consider the possibility that, despite the direction in the questionnaire, some of the respondents may have continued to distinguish between 'conciliation' and 'mediation' on other bases. For example, one SFLA member took the time to remark:

> I accept that there is a great deal of confusion about all the terms that are used in relation to dispute resolution in the family breakup context ... In my view the two terms, 'conciliation' and 'mediation', must be used to define two quite separate and distinct processes with different objectives ... If one is conciliating, one is conciliating, whether the dispute under review relates only to children or includes property matters as well ... The objective ... is to make the parties ... work out for themselves the resolution of the dispute. No coercion is used ... and even still less ... is any decision ever imposed ... Nor does it make any difference whether it is in-court or out-of-court conciliation ... Mediation is a similar concept, though different in fundamental respects. Mediators will insist on the production of information ... [and will] decide what information is required. Therefore they bring expertise of investigation to the job. Thereafter, although they will try to persuade the participants to come to their own resolution, in the ultimate event they will state what they consider to be a fair resolution ... It is therefore much nearer arbitration than true conciliation.

We cannot tell from the SFLA survey how many may have continued to use this or other distinctions when they addressed the survey questions. Thus as we move through

57 See first page of the SFLA questionnaire, Appendix A-4.

the lawyers' comments and recommendations, we must consider the implications of the possible usage of other definitions.

Since most conciliators/mediators and lawyers in Greater London used the terms 'mediation' and 'conciliation' interchangeably, since when they did make distinctions they were not in agreement about what distinctions to use, and since every conciliation/mediation service in Greater London combined aspects from both sides of every distinction,[58] we had to abandon any thought of distinguishing between the terms 'conciliation' and 'mediation' in this study on any basis other than differences in the issues being mediated. Thus, for purposes of consistency and to avoid confusion and misunderstanding, in this study the term 'mediation' is normally used to refer to all mediation and conciliation processes. Where it is important to distinguish between processes which are limited to child issues and those which also include property and financial issues the former processes are referred to as 'conciliation' and the latter as 'global mediation'. Practitioners are identified as 'conciliators' if the bulk of mediation they practised was limited to child issues, and are identified as 'global mediators' if they regularly mediated property and financial issues as well as child issues. When mediators are quoted, the terms they used have not been changed. Wherever either term is used in this study it shall be assumed that the process focused on, but was not necessarily limited to, interpersonal negotiations and discussions between or among disputants with the assistance and guidance of a third party or parties, about practical and legal matters arising from the breakdown in the spousal relationship between the adults in a family unit. It is also assumed that the disputants, not the third-party mediator, had final decision-making power.

58 See chapters 3 and 6 and Appendix A-1.

CHAPTER 2

The Practising Mediators and Family Lawyers: Who Are They?

Introduction

This chapter introduces the 102 mediators and the 155 practising SFLA lawyers who participated in this study. If we are to interpret the practitioners' comments, we need to know something about them. Presently, we turn, therefore to an examination of the mediation practitioners' occupational and professional backgrounds, their formal education and training, and their mediation experience. For comparative purposes, we shall look at these experiences in conjunction with the collective family law experiences of the SFLA lawyers. We shall find that the lawyers were family law specialists with extensive settlement experience. The practising mediators had considerable experience, education and training in the social-work, counselling, mental-health and therapy fields but lacked legal and mediation training and experience. Greater London's family lawyers have expressed a concern about the education and training of family mediators.[1] This chapter provides justification for that concern.

The information about the mediation practitioners to be discussed in this chapter has been taken from an educational questionnaire survey of the practising mediators, supplemented by information obtained during the course of 122 interviews with the practitioners, heads, and consultants of the mediation services.[2] There are many ways one can develop knowledge and expertise: formally, by taking courses and

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1 L. Neilson (1990).

2 In addition to in-depth interviews with 102 practitioners, heads of services and consultants were also interviewed. This figure does not include the 1988 interviews to update information about the services.

attending lectures and workshops; experientially, through one's work and personal experience; and informally, by self-directed study and reading. Consequently the educational questionnaire sought information about the practitioners' mediation experience, occupational backgrounds, academic qualifications, education and training in selected subjects, and related reading. As we saw in chapter 1, 88 of the 102 participating mediators (86.3%) responded to the educational survey. Occasionally those who completed and returned the questionnaire did not answer every question fully. Sometimes those who did not return a questionnaire nevertheless gave the necessary information in the course of their interview. We shall find, therefore, that the total number of mediators about whom we have information on any given subject, varies. Where appropriate, we shall compare the information we have about the mediation practitioners to our information about the SFLA family-law practitioners.

The Personal Attributes Of The Practitioners

Before moving on to an examination of the practitioners' experience and education, let us briefly examine the personal profiles of the mediation and legal practitioners. In 1987 those providing mediation[3] services in Greater London were predominantly women, (68.8%, or 75/109,[4]), and most were fifty years of age and older (55.7%, or 54). Very few (20.6%) were under forty. In-court mediators tended to be younger than their out-of-court colleagues.[5] The majority of the mediators (78.5%, or 73), had children, and most (66%, or 62) had been married and had never divorced.[6] 24.4% had personally

3 Unless otherwise specified the terms 'mediation' and 'mediator' continue to include the terms 'conciliation' and 'conciliator'.

4 I have a limited amount of information about seven of the conciliators/mediators who were not interviewed.

5 33.3% (11/33) of the in-court as opposed to 14.1% (9/64) of the out-of-court practitioners were under the age of forty and 51.5% (17/33) as opposed to 57.8% (37/64) were fifty years of age and older. Probation and court-welfare officers were included in the out-of-court category if the mediation services they offered were independent of the courts. Respondents were asked to indicate their ages within given ranges rather than specifically to dispel any sensitivity. The categories offered were: 20-29, 30-39, 40-49, 50-59, 60+.

6 Most of these would be presently married to their first spouse. Those whose partners had died could also fit in this category, however, as the questions asked were: 1) have you ever been married?; 2)

experienced divorce and 9.6% had never married.

If we compare the mediators' personal profiles with those of the SFLA lawyer respondents, we find more men than women and that the SFLA respondents tended to be younger. Fifty-three per cent of the 152 SFLA respondents were male, 55.9% had children, and few (14.6%) (of the 151 who answered the question) had personally experienced divorce. Very few (12.5%) of the SFLA respondents were 50 years of age or older. The majority (59.2%) were under the age of 40.[7]

This age difference may become important as lawyers become mediators. At the time of this survey very few (9) of Greater London's mediation practitioners were lawyers.[8] In our SFLA survey we found, however, that a large number (49.7%) of the lawyers reported they would definitely or probably begin to do mediation should the Law Society grant permission. Another 27.3% indicated that they might possibly do so.[9] Many family lawyers have now started to practice mediation in England as members of the Family Mediators Association (FMA). When we look at the personal attributes that the mediation practitioners recommended for mediators, we shall find an emphasis on maturity of experience and outlook.[10] Despite the five year, post-qualification experience requirement of the FMA,[11] we can expect the influx of FMA lawyer graduates to lower the average age reflected in the mediator survey since it is likely to be the younger, rather than the older, established lawyers who will seek to enter the field. This may have a negative impact on disputant satisfaction as we know from the social work and mediation consumer literature that consumers of social services do not like being assisted by young workers.[12] Perhaps the FMA will be able to avoid this by

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have you ever personally experienced divorce?.

7 For a complete breakdown of the ages of the SFLA respondents, see: L. Neilson (1990).

8 I am including barristers, solicitors, law teachers, and legal executives.

9 L. Neilson (1990): 263.

10 See chapter 8.

11 Family Law 19 (1989): 456-457.

12 See, for example: C. Clulow and C. Vincent (1987): 166; G. Davis and M. Roberts (1988): 84-5; E. M. Goldberg and R. W. Warburton (1979): 17; M. Murch (1980): 49; S. Rees and A. Wallace (1982): 36.

teaming younger lawyers with older, experienced mediators. Or perhaps, as G. Davis and M. Roberts suggest, consumer complaints about age and maturity are spurious and mask other concerns.[13] Several researchers have examined the relationship between age and mediator success and have not been able to establish a connection.[14] Mediator success and disputant satisfaction, however, are not always going to be synonymous. Perhaps consumers want to be assisted by older, more experienced workers for reasons not connected to outcome.

The Practitioners' Occupational Or Professional Backgrounds and Experience

We turn now to an examination of the occupational and professional backgrounds of Greater London's practising mediators. The first thing we discover is that very few (4) of Greater London's mediators considered mediation their primary occupation. This is not surprising. In 1987 and 1988, mediation in Greater London continued to be very much a part-time activity.

When we look at the primary occupations of Greater London's mediation practitioners we find that court-welfare officers (42.6%, or 46/108)[15] dominated the field. The other professions or occupations were not nearly as well represented: social workers 13.9%; Marriage Guidance counsellors 12%; lawyers 8.3%;[16] family therapists 6.5%; and probation officers 5.6%.[17] Others (accounting for 1.9% or less in each category) were: Citizen's Advice Bureau workers, magistrates, psychologists, social-science lecturers, teachers, physicians, accountants, laborers and homemakers. If we omit the mediators who did most of their mediation in the courts (all of whom were court-welfare officers), the situation changes slightly. Now court-welfare officers

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13 G. Davis and M. Roberts (1988): 85.

14 See, for example: G. Bierbrauer, J. Falke and K. Koch (1978): 94; P. Carnevale, R. Lim and M. McLaughlin (1989): 228.

15 I have information on the primary occupation of 108 of the practitioners.

16 I have included solicitors, barristers and legal executives in this category.

17 Occasionally practitioners listed or mentioned several disciplines. When that happened the dominant occupation/profession was chosen.

(16.9%) share domination of the field with social workers (21.1%) and Marriage Guidance counsellors (18.1%).

Most of Greater London's mediation practitioners had extensive experience working with people and families. Thirty of the 102 mediators[18] interviewed had counselling experience (independent of social work, court-welfare work and therapy). Eighteen of these indicated the duration of that experience. The average was 10.8 years. Fifty one of the mediators had probation or court-welfare experience. Twenty six of these specified the duration of that experience. The average was 15.5 years.[19] Twenty six of the mediators indicated previous social work experience and the seventeen who specified duration had worked as social workers for an average of 14.5 years. Eighteen had practised as therapists and fifteen of these specified the duration of that experience. The average was 8.3 years.[20] Two of the nine lawyer mediators had but limited experience with the practice of law. The average length of experience of the others was 17 years.

Nine (8.8%) of the mediators had limited or no counselling, social work, legal or therapy experience before starting to practice mediation.[21] Most of these, however, had other experience working with people in a professional capacity, for example, as a doctor or accountant, as a teacher of subjects related to mediation, or as a Citizen's Advice Bureau worker. It is apparent that the majority of the mediation practitioners had a wealth of mental-health, counselling or social-work experience.

The mediators were asked what they had learned from their related work experience that had been particularly helpful in mediation. Seventy-seven of the

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18 While I have primary occupational information for 108 practitioners, I only know the related work experiences of the 102 who were interviewed.

19 I do not have enough information to break this down into court-welfare or probation experience.

20 These experiences were not exclusively in the field of family therapy.

21 If the numbers in each work experience category are totalled, the total is 141. This is because it was not uncommon for a mediator to have experience in more than one area, for example, as a social worker and as a therapist.

practitioners answered this query.[22] The question was open ended; no suggestions were offered. The learning most commonly cited was that gained from working with people or families having problems stemming from separation and divorce: forty-three mediators mentioned the importance of this experience. The other occupational experiences considered particularly helpful in mediation practice and commonly mentioned by practitioners were: counselling experience (mentioned by 15); experience working with children (mentioned by 13); family therapy experience (mentioned by 13); negotiation experience (mentioned by 9); familiarity with the legal system (mentioned by 8); and the experience of helping people with their marital interaction (7) or communication problems (6).

In chapter 8 we shall find that the mediators were cautious about the relevance of personal knowledge gained through separation and divorce, fearing that mediators might analyze other peoples' separation and divorce experiences in terms of their own. It is clear here, however, that the mediators considered professional[23] as opposed to personal knowledge of the separation/divorce process a definite asset. The reasons for this distinction will become clearer when we discuss the personal attributes of accomplished mediators and their roles within the mediation process in chapter 8.

It is interesting to note that 50% of the mediation practitioners who indicated that they had counselling experience (15 of the 30) stressed the importance of that experience for mediation practice, while 72.2% who had therapeutic experience (13 of 18) stressed the importance of that experience. One might conclude from this that

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22 This was part of the open ended question on related work experience. Consequently some simply listed related work experience without specifying what they found helpful about it.

23 I am not using the term 'professional' technically here. The sociological literature is full of debates about the meaning of 'profession'. The term's meaning and its relationship to mediation are discussed in greater detail in chapter 10.

Clearly conciliation, mediation, family therapy and marital counselling would not fit within most technical definitions of 'profession' (although all four are currently struggling with the issue). I am using the term far more loosely here. I intend to include those who help others, unrelated to themselves, by applying knowledge, skills or techniques learned from others who have specialized knowledge; and to exclude those who help others by applying knowledge derived solely from personal life experience.

mediation practitioners find skills learned in family therapy more helpful than those skills learned in counselling. We should keep in mind, however, the possibility that counsellors are better able to adjust to new roles and processes. Perhaps therapists tend to continue to practise family therapy under the guise of mediation. The English mediation literature is loaded with examples of this combination.[24] We can find further examples among Greater London's mediation services.[25]

We should keep the professional backgrounds of the practitioners in mind when considering their opinions about the goals of the mediation process and the education and training needed to provide it. We might expect an emphasis on the importance of their own knowledge and skills, and a minimisation of the importance of knowledge and skills they did not possess. Indeed this tendency appeared among the family lawyers. The mediation practitioners did not always stress the importance of their own knowledge but they did tend to undervalue the importance of knowledge and skills outside their own areas of expertise. These tendencies are not necessarily the product of self interest since mediators and lawyers can only use, adapt, and evaluate knowledge and methods familiar to them. Consequently we shall find that the mediation practitioners in Greater London were more interested in, and concerned about, the application of social work, counselling, and family therapy knowledge and skills in mediation than they were about the application of legal and financial knowledge. The analysis of the debate among mediation practitioners about mediator education and training will, therefore, reflect this balance.

For the purposes of this study, the most important change in mediation since 1988 has been the influx of lawyer-mediators under the auspices of the FMA. We can expect this to create more mediator interest in the relevance of legal and financial knowledge. We have seen that in 1987 and 1988 there were very few lawyers practising

24 R. Gray, D. Hancock, et. al. (1987); J. Howard and G. Shepherd (1987); M. Jones (1986): 20; National Association Of Probation Officers (1984); J. Walker (1988): 240-269.

25 See in particular, services 16 and 17, Appendix A-1.

mediation in Greater London.[26] Consequently lawyers were not strongly represented in the mediation practitioner survey. The members of the SFLA were surveyed, however, to balance the mediation practitioners' views.

The responding SFLA members had considerable experience in family law. Eight (5.3%) of the responding family lawyers started to practice family law prior to 1960; 18.7% (28) between 1960 and 1969; 44.0% (66) between 1970 and 1979; and 32.0% (48) during or after 1980.[27] Thus 68% of the respondents had over eight years of experience in family-law practice. Furthermore, the majority (53.9%) devoted over 60% of their legal practices to family law.[28] The lawyers were thus able to base their views and opinions on extensive professional family law experience.

SFLA members also reported substantial settlement experience. They reported spending most of their time in their law practices on settlement activities.[29] Sixty percent indicated devoting 60% or more of their professional time to non-litigious matters.[30] Put another way, the majority of these solicitors reported spending 40% or less of their time on litigious aspects of their family-law cases.[31] Furthermore, 44.4% of

26 I am using the term 'mediation' in a formal sense. We know that family lawyers provide dispute-resolution services to their clients in the normal course of family law practice: see Chapter 9 for further discussion. In fact some of the services family lawyers provide, particularly negotiations conducted by lawyers and disputants in the presence of each other, and the process which occurs when a lawyer represents one side of the dispute while the other disputant remains unrepresented; strongly resemble the mediation process. Despite the similarities, I have not included the practice of law within the meaning of 'mediation'. For a discussion of some of the similarities and differences between what lawyers do and what mediators do, see Chapters 9 and 11.

27 Some solicitors put in two dates: one for the beginning of their articling experience in family law and another for the date they began to do family law work as a solicitor. Where two dates were given, I arbitrarily used the later date, so the degree of experience may be somewhat under represented.

28 For further particulars, see: L. Neilson (1990).

29 Other researchers have also found that family lawyers spend much of their time trying to settle their cases. See, for example: I. Baxter (1979): 199; G. Davis (1988a): 85-126; G. Davis, A. MacLeod, and M. Murch (1982a): 40; Department of Justice (Canada) (1988); H. Erlanger, E. Chambliss, and M. Melli (1987): 591-603; W. Felstiner and A. Sarat (1988): 23; A. M. Hochberg (1984); R. Ingleby (1986): 57 and (1988): 43 and (1989): 230; K. Kressel (1985): 284; G. Williams as quoted by Carol Liebman (1987): 35-37; H. O'Gorman (1963); A. Sarat and W. Felstiner, (1986): 93.

30 The questionnaire defined 'non-litigious matters' as: discussing with clients issues relating to children; assisting clients with their emotional troubles; taking steps to encourage settlement; and drafting and amending agreements and consent orders.

31 Eight of the respondents indicated their inability to answer this question because of the overlap in categories. For example, information obtained for trial could be used in settlement discussions.

the respondents stated that they were settling more than 80% of their cases without trial or hearing and an additional 30.7% reported settlement of over 60% of their cases.[32] The respondents to the SFLA survey had, therefore, abundant professional experience helping people through divorce and separation processes. The rates of settlement and non-litigious emphasis displayed a commitment to settlement and to non-adversarial approaches to family law. These family lawyers should, therefore, have had particularly well-informed opinions about the expertise required by others who would attempt to assist families with the settlement of their family-law disputes.

The Mediators' Formal Education and Training

Let us turn now to the mediators' academic qualifications and then to their formal education in specific subject areas.[33] Unlike their North American colleagues, very few (18.6%, or 18/97)[34] of Greater London's mediators indicated that they held post-graduate degrees.[35] Of these 18, 6 declared that they held post graduate diplomas, 9

Likewise, information for settlement could be used if the case were to go to trial.

32 Solicitors were asked not to include cases settled without their assistance. For further particulars see: L. Neilson (1990).

33 When reading this section it will be important to remember that the information is based on self reports and not on independent investigation. Two problems come readily to mind. We might expect the practitioners to want to create favourable impressions. This might have led some to exaggerate educational claims. Most of the respondents had been working in related fields for many years, however. It is doubtful that all were able to recall every course/lecture/workshop attended when they answered the questionnaire. We would expect this to result in an underrepresentation of formal education. While to a certain extent the influence of one phenomenon might be expected to cancel the influence of the other, we have no assurance that this is so, nor do we know the respective strengths of the two influences.

34 I have information on the academic backgrounds of 97 practitioners.

35 a) Some caution should be exercised in interpreting the information in this section. While the questionnaire asked the mediators to list their "highest academic qualification(s)" (see Appendix A-3), I cannot be sure that all of the mediators did so. I cannot be sure, for example, that all those who listed certificates of qualification in social work (CQSW,s) without also indicating a bachelor's degree, post-graduate diploma, or master's degree obtained that certification at the undergraduate level. (In 1987 and 1988 CQSW certifications could be obtained in England at the end of a two year, undergraduate programme: CCETSW, Professional Training, leaflet 2 [1986]). Although some of the mediators specified that they had bachelors degrees or masters degrees or post graduate diplomas when they listed their certificates of qualification in social work, I can't be absolutely sure that none of the others held similar degrees.

b) The results are largely due to the fact that law and social work are commonly studied at the undergraduate level in England. All those who stated they held post-graduate diplomas; or masters, MPhil, or Phd degrees were included in the 'post-graduate degree' category. In the United States and Canada somewhere between 33% and 84% of the mediators hold post-graduate degrees, see, for example:

Masters or MPhil degrees, 2 PhDs, and one MD. Twenty four (24.7%) of the mediators held bachelors' degrees. Thirty more (30.9%) had certificates of qualification in social work (CQSWs),[36] or Home Office probation certificates,[37] and 13 (13.4%) held miscellaneous undergraduate diplomas. Eight (8.2%) had training as Marriage Guidance counsellors. The remaining four had very little formal education and training.[38]

Academic backgrounds do not necessarily, however, tell us much about preparation for mediation practice. This is particularly true in England where researchers have discovered large variations in academic course contents, especially within the social work discipline.[39] We must, therefore, consider mediator education by subject area. The practising mediators were asked to indicate whether they had taken formal training or courses in the following areas and if so to specify the number of hours[40]: the effects of marriage breakdown on family members, child psychology, family systems theory, counselling techniques, psychotherapy,[41] spousal and child maintenance law, the law concerning property division after marriage breakdown, custody and access

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Department of Justice (Canada) (1985), (1987), (1988b): 170-171; E. Lyon, N. Thoennes et. al., (1985): 19; A. Milne, '(1983): 17-22; G. Paquin (1988): 72; J. Pearson and N. Thoennes (1988a): 90. (Whether or not these degrees are relevant to the practice of mediation is another question.)

36 There were many ways to obtain a CQSW or social-work certification in England in 1987: CCETSW (1986). The usual minimum requirement was a two-year, under graduate course.

37 In years past the English government's Home Office Department ran a one and later two year training programme for probation officers. That programme was abandoned sometime ago and most probation officers are now trained as social workers.

38 There is no duplication here. Mediators were placed only in the highest educational/academic category specified.

39 See, for example the research of: G. Barnes (1984) 22-23; C. Ball, R. Harris, et. al. (1988); A. Sutton (1983): 146-154; J. Terry: 2-6.

40 Practitioners were asked if they had taken any training or courses in the given subject areas. They were asked to include only time spent with an instructor and to omit study hours before and after instruction.

41 For the sake of brevity I shall not be dealing with mediator knowledge about step-parents or psychotherapy in any detail. We might note that the majority (14, or 53.8% of the 26 in-court mediators who answered the question and 35, or 61.4% of the 57 out-of-court mediators who answered the question) had not taken any courses about step-parents since becoming mediators and that most mediators had some education in psychotherapuetic techniques. (Only a minority, 2, 7.1% in-court and 14, 24.1% out-of-court mediators who answered the question recorded no formal education in this area. The large number of practitioners having had some exposure to the principles of psychotherapy is not surprising, given the age range and professional backgrounds of the respondents.

law, courses about step-parents,[42] mediation techniques, and whether they had had a mediation apprenticeship with an experienced practitioner.

Not all of the respondents were able to specify the number of hours of formal training they had received in all subject areas. Some were not able to provide this information because the subjects were not taken individually but in combinations, for example as part of a one or two year CQSW course.[43] Others simply could not remember all the courses they had taken over many years of practice. Most estimated as best they could. The respondents who were not able to specify number of hours usually indicated the degree of their training, for example 'many', 'few/limited' hours; or indicated whether or not the subjects were covered and the course(s) in which they were taken. Consequently new, broad categories have been devised to accommodate the range of the answers. Two questions sought the content of the mediators' formal education: one covered education before commencement of mediation practice, the other after; for the sake of brevity these categories were combined for most subjects. The interviews with the mediation practitioners usually did not include discussions of the specific content of their education and training. Consequently the information in this part, unless otherwise specified, will be limited to questionnaire data, supplemented occasionally by information taken from the interviews.[44]

We turn first to an examination of the mediation practitioners' formal educational exposure to mediation, including time spent in mediation apprenticeship.[45]

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42 See footnote 41 above. I am not dealing with the step-parenting subject in any depth because I have information only on the post-mediation training of the practitioners in this area, not because I think the problems of step-parents and blended families are unimportant. In fact finding the correct balance between first and subsequent families in terms of their boundaries and connections, emotional and financial needs, their interests and rights, and the welfare of the children within them, is probably one of the biggest challenges facing both the legal and the welfare systems in the family law field today.

43 A CQSW can sometimes be obtained in one year if the student already has a relevant social science degree, diploma or certificate: CCETSW (1986): vii.

44 On occasion I resorted to the interviews in order to clarify questionnaire data or to obtain further detail.

45 'Education in mediation' is a combined category. Formal mediation training is likely to be over, rather than under stated here. To be placed in the 'no instruction' category, the respondent had to indicate that he or she had had 'no hours' of instruction in mediation techniques and no mediation

Surprisingly, almost one quarter (24.7%, or 18) of Greater London's mediators reported no or limited (under 11 hours) education in mediation.[46] Twelve of these 18 provided mediation in the courts and all but three were probation or court-welfare officers. This tells us that many of the court-welfare and probation officers were not being adequately prepared for mediation practice.[47] This does not mean, however, that, at the time of the survey, they were necessarily less knowledgeable about mediation. When we look at the practitioners' mediation experience later in this chapter, we shall find that the in-court mediators tended to have more mediation experience. If the researchers are correct that mediation experience is related to mediator success,[48] it may well be that this extra experience compensated for the probation and court welfare officers' lack of formal instruction. Certainly the probation and court-welfare officers' comments and suggestions throughout this study suggested that they were among the most experienced and knowledgeable of all of Greater London's mediators.

TABLE 2 - 1
Mediator Education

	In-Court Number	**Out-of-Court** Number	**Both** Number	**Percent of Total**
None	8	3	11	14.5%
Limited	4	4	8	10.5%
Intermediate	5	14	19	25.0%
Considerable	8	30	38	50.0%
In Training[49]	1	4	5	
No Answer[50]	3	4	7	

While it is certainly cause for concern that almost one quarter of the mediators

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apprenticeship both before and after starting practice. In order to be placed in the limited category, the hours in all four categories would have had to total less than 11.

46 In the mediator questionnaire the term 'conciliation' and not 'mediation' was used because most practitioners commonly used the former term. Most mediators used the two terms interchangeably. (For further discussion, see chapter 1)

47 See also J. Kingsley (1990): 189.

48 For example: T. Kochan and T. Jick (1978); J. Pearson and N. Thoennes (1988b).

49 I have excluded from the education categories those who were in the middle of their preparatory mediation training.

50 I have included here those who failed to answer the question and those I could not classify.

had minimal formal mediation training, and that one-half had no more than 24 hours of specialized training, the results are not surprising. Many of the mediators began to practice mediation before any formal educational programmes were in place. Greater London's mediators in this regard were not unlike their colleagues in other countries: Canadian and American researchers tell us that many of the family-law mediators practising in those countries also had little or no formal mediation training.[51] Even those with formal training usually have taken courses of less than one week's duration.[52] It will be important to keep in mind Greater London's mediation practitioners' educational profiles, particularly their lack of formal instruction in mediation throughout this study.

When we separate 'apprenticeship' from formal training in mediation and look at it on it's own, we discover that the majority of the practitioners (60.3%) had had no opportunity to work alongside an experienced practitioner before beginning to practice mediation themselves. As we see in Table 2-2, this was especially true of the in-court mediators.

TABLE 2-2
Mediator Education: Preliminary Apprenticeship with an Experienced Mediator

	In-Court		Out-of-Court	
	Number	Percent	Number	Percent
None	24	85.7%	23	46.0%
Limited	3	10.7%	11	22.0%
Intermediate	1	3.6%	6	12.0%
Considerable	-	-	10	20.0%
In training	1	4		
No Answer	-	5		

It appears from these figures that out-of-court mediation services were doing a better job preparing mediators for practice than were the probation and court-welfare

51 Department of Justice (1988b): 166, (1988c): 49; A. Elwork and M. Smucker (1988): 27; J. Fuhr (1987): 65; A. Milne (1983): 17; T. Musty and M. Crago (1984): 73. For somewhat better results see: F. Perlmutter (1987): 11-22.

52 J. Fuhr (1987): 65; A. Milne (1983): 22; C. Moore (1983): 87.;

services.[53] The mediators who had been offered no preliminary education or training in mediation were critical of this. The strongest criticisms came from court-welfare officers working in the courts, none of whom considered their preparatory training in mediation adequate. They had this to say:[54]

> There are very few training centres. . . At [name of out-of-court service] we have had good training, over a year. . We go on training whereas in probation services you just do it and work out a way. (former court-welfare officer/conciliator)
>
> I'm not trained in conciliation, none of us are. We are just muddling through. (court-welfare officer/conciliator)
>
> What training is there? . . What we do is start and then perhaps get training as we go along. . . You are expected, I suppose, to use your social work skills because that is the training we have had. . It is partly what is needed but I think there should be more training in conciliation techniques as such. It would be very useful indeed. . . I would have liked to have observed for a while before I had to do it. In fact I think I observed one morning . . and that was all and then right in. . . No one has told me how to do this job and I don't know what I am supposed to be doing. (court-welfare officer/conciliator) [55]

If the court-welfare branch of probation services is to continue to provide mediation, the lack of educational preparation reflected here will have to be addressed.[56]

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53 This conclusion was also reached in the Newcastle Report (1989): 338.

54 The quotes which follow are taken from the mediator interviews and not from the questionnaires.

55 This respondent was one of the three in-court mediators with some limited mediation apprenticeship.

56 This is not the only educational/professional concern that needs attention. I found the majority of the court-welfare officers in Greater London were discouraged and highly critical of the probation service for the low priority given not only to mediation work but also to family work in general. They were also very critical of the lack of preparatory and in-service educational programs in family work being offered by the probation service. Unlike R. Gray, D. Hancock and J. Hutchings (1987): 12, I did not find that most officers thought their probation backgrounds adequate preparation for the practice of court welfare work. I found quite the opposite: that while the officers felt certain aspects of their probation experience helpful, they felt decidedly unprepared for court welfare work. [See also: G. Davis and K. Bader (1985b): 83; J. Eekelaar (1982): 83; A. James and K. Wilson (1983); J. Kingsley (1990): 183, 187.] Greater London's officers were of the opinion that the Probation hierarchy lacked an understanding of the differences between criminal and family work and of the complexity of the work they were being asked to do:

> Unless someone actually teaches you and tells you - because it [court-welfare work] is so very different. I found that when I first came here, how very different it is and I found when I first started here and when I look back on it now I realize what a minefield the job is, but when I started I went into it so innocently. It has only been when you look back

When we look in at the education and training that the mediation practitioners propose for people wishing to become mediators in Chapter 11 we shall see that 65.7% of the practitioners considered apprenticeship with an experienced mediator an essential component of mediator training and that another 19.6% considered it very helpful. Most of the SFLA family lawyers (60.3%) agreed. It is clear that apprenticeships or a

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that you realize what the pitfalls were. (in-court conciliator)

This is one of the areas I disagree with headquarters. Coming into this unit I didn't realize how different it was from probation - totally, totally different - It really is a specialized specialism. (in-court conciliator)

I was virtually thrown in at the deep end. Conciliation was something very new. . . Our training unit isn't coming to us and saying, "Well we are setting up a day on Muslim marriages" or whatever and there is a growing feeling . . that there should be a separate organization of court-welfare officers because we are learning individually on the job. ((in-court conciliator)

See also: A. Foden and T. Wells (1990): 189.

In fact many officers, without solicitation, said they thought the court-welfare service should be separated from probation, either forming a separate division within the service but with its own career structure and funding or that it should be separated completely and should fall under the jurisdiction of the Lord Chancellor's Office. (See also: M. Murch, J. Hunt, and A. Macleod [1990]) Full discussion off this issue is outside of the scope of this study but I offer here some typical comments and concerns:

I'm fast coming to the opinion that the court-welfare service has to be a professional service in its own right with its own professional structure meeting its own training needs. I'm not sure it is appropriate for it to be connected to the probation service anymore. It would be more comfortable for me if it remains but looking at it purely from the clients needs, I'm not sure the clients wouldn't be better served having it separate. It needs a specialist field. (court-welfare officer/conciliator)

[The following is a conversation with several officers. A change in speaker is identified by a change in number.] #1: The civil work has a very low priority in the probation service. It is thought of as the bottom of the rung. #2: I think it is the most valuable work the service does. #1: But you can't prove the effectiveness. You can't show it like how many people are going to prison. #2: Actually lots of these people are growing up. ... . We have been told categorically . . that it is a question of priorities. We need a new headquarters. . . We are very concerned and cut off from the main probation service.

The officers also suggested that probation officers will be even less well prepared for court-welfare work in the future. This is because increasingly most family work in Greater London was being done in specialized services. Consequently non specialized probation officers were being given little exposure to family law cases.

practicums ought to offered to all beginning mediators.

Let us turn to an examination of the mediators' formal education in the social-work/mental-health and legal fields, starting with counselling. Not surprisingly, given the fact that most of the Marriage Guidance counsellors mediated outside the courts, the out-of-court mediators indicated more formal counselling training than their in-court colleagues.

TABLE 2-3
Mediator Education: Counselling

	In-Court		Out-of-Court	
	Number	Percent	Number	Percent
None	1	3.6%	7	12.1%
Limited[57]	7	25.0%	4	6.9%
CQSW or HO[58]	7	25.0%	2	3.4%
Intermediate[59]	4	14.3%	13	22.4%
Extensive[60]	9	32.1%	32	55.1%

When the categories are combined we note that 77.5% of the out-of-court respondents claimed 'intermediate' or 'many' hours of counselling training, as opposed to 46.4% of their in-court colleagues. Very few mediators had had no formal counselling training, an important statistic to remember when we look at the mediators' opinions about the need to acquire this type of training. The mediators appear reasonably well qualified to assess the importance of counselling in mediation.

When we look at the mediators' formal training in child psychology we note that about one quarter of the mediators (24.7%) reported very limited formal instruction in this area before beginning mediation practice,[61] and that only 30.6% claimed

57 'Limited', 'a little', 'a few', or comparable terms used by the respondent or fewer than 11 hours listed.

58 Training specified to be that gained in original CQSW or Home Office training.

59 'Quite a few', 'a fair number', [of hours] or similar terms used by the respondent or 11 to 25 hours listed.

60 'Many', 'countless', 'extensive' or similar terms used by the respondent; the respondent was a trained Marriage Guidance counsellor; or the respondent specified in excess of 25 hours.

With the exception of the inclusion of Marriage Guidance counsellors in the 'many' [hours of counselling] category, I have defined the categories in the same way as in footnotes 57, 59, 60 throughout the discussions of particular subject matters.

61 This question was limited to courses taken before mediation practice. All other subject

extensive preliminary instruction in this area.[62] All of the 10 mediators who reported no formal instruction were working in out-of-court mediation services.

TABLE 2-4
Mediator Education: Child Psychology[63]

	Number	Percent
None	10	11.8%
Limited[64]	11	12.9%
Home Office only	3	3.5%
Marriage Guidance only	8	9.4%
CQSW only	8	9.4%
Intermediate[65]	19	22.4%
Extensive[66]	26	30.6%

We shall be discussing in detail in Chapter 12 the mediators' views on the relevance, importance, and limitations of the knowledge needed from this area. We should note here that most practitioners thought it either essential (71.3%) or very helpful (12.9%) to include instruction from this area in mediation training programmes, although they did not always agree on the extent of knowledge needed or the appropriate application of that knowledge within the mediation process. The latter debates will be aired in Chapters 5 and 12. For the moment it is important to note that even mediators without extensive formal instruction in this area considered the subject important for mediator training.

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categories, with the exception of stepparents, include courses taken before and after starting to practice mediation. The 11 (13.3%) who specified that their instruction in this area came from Home Office or CQSW courses should also perhaps be placed in the 'limited' category. Several authors have criticized social work educators for their lack of instruction in this area: Department of Health (1985a): 22; A. Sutton (1983): 146.

62 C. Clulow (1990a): 264, comments that social work syllabuses are lacking in the area of human growth and development. Perhaps the conciliators' answers are a reflection of this.

63 L. Parkinson (1988a), surveyed mediation services affiliated to the NFCC in England. Most of these operated outside of the courts. She received responses from 21 of the 42 affiliated services. From those responses she estimated that about 63% of the mediators working in those services had received some instruction in the area of child psychology and development. 88.6% of the mediators I surveyed in Greater London claimed some preliminary instruction in this area although, as we see from this Table, the extent of that instruction was often limited.

64 See footnote 57, I have used the same designations throughout.

65 See footnote 59, I have used the same designations throughout.

66 See footnote 60, I have used the same designations throughout.

There were no appreciable differences between in-court and out-of-court mediators with respect to their family-systems theory training. Given the amount of attention this theory has received in the mediation literature,[67] it was surprising that almost one-half (47.6%)[68] of the mediators had had but limited exposure to it.

TABLE 2-5
Mediator Education: Family Systems Theory

	Number	Percent
None	16	18.6%
Limited	16	18.6%
Marriage Guidance only	7	8.1%
CQSW or H.O.	2	2.3%
Intermediate	15	17.4%
Extensive	30	34.9%

When we examine the mediation practitioners' opinions about the formal education that one needs to practice mediation, we shall see that they did not always agree with those who write the mediation literature. Questions about the relevance of family systems theory to mediation were controversial. That controversy will be aired in chapters 6 and 12. There we shall see that only 43.1% of the practising mediators thought formal instruction in family systems theory essential or very helpful to mediation and that, for the most part, the family lawyers did not assign priority to this subject either.

We turn now to 'the effects of marital breakdown on family members'. Interestingly 33.3% (9) of the in-court mediators indicated that they had not had any courses, lectures, or workshops on the effects of marriage breakdown on family members before beginning mediation practise.[69] Another 37.9% (11), specified they had

67 For some of the many authors who have argued that it is important the mediators have education and training in family systems theory, see: D. Brown (1982): 22; F. Gibbons and D. Elliott (1987): 14; S. C. Grebe (1988b): 16; J. Howard and G. Shepherd (1987); H. Irving and M. Benjamin (1987); L. Parkinson (1987a): 149; D. Saposnek (1983a): 37; J. Walker (1986): 44-5. L. Parkinson, in her survey of NFCC services (see footnote 63 above) found that it appeared that about 44% of the NFCC mediators had some training in family systems theory.

68 In arriving at this percentage I included those who indicated they had had family systems training in Marriage Guidance and CQSW courses. All had taken these courses many years before the survey and while they may have been exposed to some theories about family interaction and behaviour, it is unlikely these courses included much discussion of family systems theory per se.

69 If we look at court-welfare officers and probation officers practising mediation both in and

had only limited preliminary education from this area or only that offered in their initial CQSW or Home Office training. Only 24.1% (7) claimed many hours of preliminary education. These results are similar to those reported by A. James in 1985,[70] although, as we shall see, it appears that, at least in Greater London, there has been some improvement in the officers' in-service training. The lack of preparatory education in this area is curious. One would have thought that a thorough knowledge of this area, including the study of the effects of different custody/access arrangements on the well-being of children, was essential for all court-welfare work.

Most court-welfare officers, however, had taken some courses or attended lectures/workshops on the effects of marital breakdown on family members after starting to practice mediation. When pre- and post-mediation answers are combined we find only one in-court conciliator still claiming to lack any formal education in this area. We might note, though, that even after we combine the answers, only 46.4% of the in-court officers claim intermediate or extensive levels of formal training.[71]

TABLE 2-6
Mediator Education: Effects Marital Breakdown

	In-Court		Out-of-Court		Total
	Number	Percent	Number	Percent	Percent
None	1	3.6%	7	12.1%	9.3%
Limited	6	21.4%	6	10.3%	14.0%
Marriage Guidance only	-	-	7	12.1%	8.1%
CQSW or HO only	8	28.6%	2	3.4%	11.6%
Intermediate	4	14.3%	19	32.8%	26.7%
Many	9	32.1%	17	29.3%	30.2%

These figures tell us that a substantial minority (particularly if one assumes limited instruction on the effects of marital breakdown on family members in Home

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out-of-court, we find that 32.5% (13/40 who answered) reported no preliminary formal instruction in this area, and another 14, 35.0%, limited education: under 11 hours of preliminary instruction (4) or only that offered in their initial CQSW or Home Office Courses (10).

70 A. James (1988b): 68.

71 If I combine in- and out-of-court probation and court-welfare officers, 51.2% claim intermediate or many hours of instruction in this area.

Office, CQSW, and Marriage Guidance courses)[72] of the practising mediators had but little formal instruction on the effects of marital breakdown. This needs to be addressed. When we begin to look at the education and training that the practising mediators thought necessary to include in mediator training programmes, we shall see that this subject was considered to be one of the most important: 91.2% of the mediators felt instruction in this area to be essential.

The situation with respect to the mediators' formal legal education was even more worrying. Seventeen, or 20.0%, of the practitioners had never attended formal lectures or workshops on child custody and access law, either before or after beginning to practice mediation. Another 57.0% (49) recorded only "limited" or "under 11 hours" of formal education in this area; 2 had received only that provided during Marriage Guidance or Citizen's Advice Bureau training.[73] If we exclude the few mediators who were lawyers,[74] only 6.3% (5) of the others were able to claim "many" or "over 25 hours" of formal instruction in child law.[75]

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72 It appears from the research of A. James (1988b): 68 and A. James and K. Wilson (1983): 50; that probation officers receive little preparatory education in this area. For discussion of the content of Marriage Guidance courses see: W. Dryden and P. Brown (1985): 301; J. Ross (1985): 149; N. Tyndale (1982): 76.

73 L. Parkinson (see footnote 63) found that about 34% of NFCC mediators had training in the area of matrimonial and family law.

74 Six of those who completed this questionnaire were barristers, solicitors, or legal executives.

75 The post mediation practice questions on legal education were limited to courses given by lawyers. The pre mediation questions were not. This enabled the respondents to include any preliminary training in law even if it was not given by a qualified lawyer, perhaps as part of a CQSW or Home Office probation course. (It appears that the legal content of these courses is often given by non lawyers: C. Ball, R. Harris, et. al. [1988]). It is possible that some of the mediators had some formal instruction in family law after becoming mediators which was not recorded because the lectures or courses were not given by lawyers.

TABLE 2-7
Mediator Education: Custody and Access Law

	Number	Percent
None	17	20.0%
Limited	48	56.5%
CAB or MG only[76]	2	2.4%
H.O. or CQSW only[77]	-	0.0%
Intermediate	8	9.4%
Many	10	11.8%

Unless we decide that it is not important for mediators to have substantive knowledge of the matters in dispute,[78] these results should give cause for concern. All of the mediators in Greater London were helping disputants work out problems about access to children. Most were also prepared to assist with legal custody disputes. We shall find, in chapter 13, that, despite the limitations in their own training, most (84.3%) of the practising mediators thought it essential for new mediators to gain knowledge of child law. Not surprisingly, the family lawyers agreed.[79] We shall discuss the specifics of the legal education that the practitioners thought necessary in Chapter 13. The mediators' responses to the educational survey tell us that the mediators' own education and training needs in the area of child law were not being met at the time of the survey. The lack of formal mediator education and training in this area validates the

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76 Legal training in child law limited to content in Citizen's Advice Bureau or Marriage Guidance courses.

77 Most respondents designated a number of hours or used terms such as 'limited', 'a few', 'quite a few', 'many', 'countless', rather than saying their formal instruction in this area was obtained in Home Office or CQSW courses. This is not surprising. The dearth of legal content in CQSW courses has been repeatedly criticized: C. Ball, R. Harris et. al. (1988); Department of Health and Social Security (1985a); E. M. Goldberg and R. W. Warburton (1979): 16; R. Gray, D. Hancock and J. Hutchings (1987): 19-20; L. Hilgendorf (1981): 25, 63; J. Terry: 2-6.

78 I am making the assumption here that some substantive knowledge is important. My assumption may not be correct. The research in the area is contradictory. We know from the research that those with more mediation experience: T. Kochan and T. Jick (1978): 229; J. Pearson and N. Thoennes (1988b): 436; and those perceived by disputants to have more ability: D. Brookmire and F. Sistrunk (1980): 323; tend to be more successful. It also appears that general knowledge concerning the issues in dispute may be related to outcome: P. Carnevale, R. Lim et. al.. (1989): 229. Other researchers, however, have not been able to establish a connection between the professional background of the mediator (which one might expect to be strongly related to education), or education, and mediator success: A. Elwork and M. Smucker (1988): 21; T. Kochan and T. Jick (1978): 229.

79 77.6% of the lawyers ranked knowledge of child law essential for the mediator, and another 15.1% very helpful.

Greater London's family lawyers' concerns about mediator education and training.[80]

When we looked at Greater London's mediation services in chapter 3, we found that most were not assisting disputants with conflicts over legal financial and property matters. It was not a cause for concern, therefore, that the practitioners had little formal education and training in the area.

TABLE 2-8
Mediator Education: Law of Spousal and Child Maintenance; Law of Property Division on Divorce

	Maintenance		Property	
	Number	Percent	Number	Percent
None	37	44.0%	51	60.0%
Limited	28	33.3%	18	21.2%
CQSW or H.O. only	5	6.0%	5	5.9%
CAB only	2	2.4%	1	1.2%
Intermediate	1	1.2%	1	1.2%
Many	11	13.1%	9	10.6%
Many excluding lawyers	(5/78)	(6.4%)	(3/79)	(3.8%)

If, however, mediators are to extend their services to financial and property matters, as suggested in the Report of the Conciliation Project Unit of the University of Newcastle Upon Tyne, (hereafter called the *Newcastle Report*)[81] either the lack of education and training reflected here will have to be addressed or mediators will have to be required to work very closely with family lawyers who do have the necessary knowledge. The mediators' views about property and financial mediation, and their own abilities to provide the service, are discussed in Chapter 7. Mediation and family law practitioners' views about the education and training required to practice global mediation are compared and contrasted in chapters 7 and 13. We shall find that upgrading the education and training of the mediation practitioners to enable them to practice global mediation promises to be a massive undertaking. The practitioners offer some possible solutions in chapters 7 and 14.

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80 For particulars see: L. Neilson (1990).

81 (1989): 358.

Mediator Education: Related Reading

Having looked at the mediators' related work experience and formal education and training, let us turn to our third educational component: self-directed education through related reading. Since this topic was covered only by questionnaire, the information which follows is limited to an analysis of the responses of 88 of the mediators. Two questions were asked on this topic: one about the number of books and articles read in selected areas (see Appendix A-3); the other about the specific books or articles found to be particularly helpful in mediation practice.

Not all practitioners were able to give exact numbers of books and articles read in particular subjects, but most were able to indicate a range, for example: 'a few', 'several', 'many', 'dozens', 'hundreds', 'countless'. Consequently the categories we shall be examining have been reduced to four: 'none', 'limited', 'intermediate', and 'extensive' reading in the area. The limited range covers one to six articles and five books, as well as 'a few', 'limited', and 'several' articles and books. Those who indicated a substantial number of articles, for example twelve, but fewer than five books were placed in the intermediate category. The intermediate range was seven articles and five books to twenty articles and ten books or 'quite a few', 'many',[82] and 'lots'. 'Extensive' included those listing an even greater number of books and articles or classifying the number read as: 'countless', 'extensive', 'too many to count'.[83]

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82 'Many' was commonly given and was the most difficult response to classify. In order to classify these answers properly I had to resort to the practitioner interviews. Those giving this answer who were known to be particularly well read in the area; those whose primary occupation was within the subject area; those who had exhibited great knowledge of the subject or expressed a particular interest and study in the field; and those who were teaching the subject; were moved to the 'extensive' category. The others remained.

83 The categories were created after the range of mediator answers in all subjects were considered, but to a certain extent the placement of the divisions is arbitrary.

TABLE 2-9
Mediator Reading in Selected Subject Areas[84]

	A: Psychotherapy	B*: Effects	C*: Child
No Answer[85]	13	12	11
No Reading	14 (18.9%)	5 (6.7%)	8 (10.5%)
Limited	20 (27.0%)	25 (33.3%)	21 (27.6%)
Intermediate	27 (36.5%)	34 (45.3%)	34 (44.7%)
Extensive	13 (17.6%)	11 (41.3%)	13 (17.1%)

B*: *Effects of marriage Breakdown on Family Members*; **C***: *Child Psychological Development*

	D*: Systems	E: Mediation	F*: Law:C&A
No Answer	9	9	10
No Reading	19 (24.4%)	8 (10.3%)	17 (22.1%)
Limited	25 (32.1%)	33 (42.3%)	26 (33.8%)
Intermediate	26 (33.3%)	28 (35.9%)	23 (29.9%)
Extensive	8 (10.3%)	9 (11.5%)	11 (14.4%)

D*: *Family Systems Theory*; **F***: *Law of Custody and Access.*

	G*: Law Maintenance	H*: Law Property
No Answer	12	12
No Reading	35 (46.7%)	38 (50.7%)
Limited	23 (30.7%)	21 (28.0%)
Intermediate	9 (12.0%)	9 (12.0%)
Extensive	8 (10.6%)	7 (9.3%)

G*: Law of Spousal and Child Maintenance on family breakdown; **H***: Law of Financial and Property division on family breakdown.

Surprisingly, **Table 2-9** tells us that only a minority of the mediators (47.6%) reported intermediate to extensive levels of reading in their own field. Closer examination of the mediators' answers on an individual basis revealed that most of the mediators who reported "none" or "limited" formal instruction in mediation had done little reading in the area; only two of them reported intermediate or extensive reading levels.

These results suggested the need to reconsider category levels. The requirements for each division may have been placed too high, considering the fact that

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84 Conflict theory has been excluded from the analysis because almost 30% (27.9%) of the respondents simply left the category blank.

85 Some respondents left blank spaces opposite certain subjects. This probably indicated a lack of reading in the area but it is impossible to be sure this was so. For that reason those respondents are listed under 'no answer' and have been excluded in the computation of percentages.

mediation, at the time of the survey, was a relatively new subject. There was no change in the numbers, however, when the upper limit of the 'limited' range was readjusted downwards to 6 articles and 3 books. In fact 60.3% (47) of the mediators who gave specific answers did not report having read more than two books on mediation; and 30.8% (24) did not indicate having read a single book on the topic, although some of these had read a few articles.[86] It became readily apparent that the practitioners were not remedying weaknesses in their training by independent study, and that a number of the practitioners had had but limited exposure to mediation from any source. These results also lend support to lawyers' concerns about the education and training of family mediators.

The mediation practitioners' related reading from the mental-health and social-work disciplines was more encouraging. Table 2-9 tells us that they were particularly well read on 'the effects of marriage breakdown on family members'. To a certain extent this alleviates some of the concern about the lack of formal mediator education in this area discussed earlier. Six of the 15 in-court mediators and 7 of the 22 out-of-court mediators previously reporting no or limited formal education in this area, reported intermediate or extensive levels of reading. (Six of the 15 in-court mediators and 2 of the 22 out-of-court mediators previously reporting no or limited levels of formal instruction in this area did not answer this question.) Most (61.8%) of the practitioners were also well read in child psychological development. Twelve of the 41 mediators who indicated they had not had any or that they had limited formal instruction in this area recorded intermediate to extensive levels of reading. Only a minority 43.6% (34) of the mediators, however, reported intermediate to extensive levels of reading in family systems theory. Nine of these were formerly included in the "none" or "limited" formal instruction categories.

The situation is more discouraging, however, when we look at the amount of

86 I have no explanation for this.

legal reading the mediators were reporting. Although a few mediators were making an effort to remedy their lack of formal training in child law by independent study, only a minority (44.2% or 34) of the practitioners reported intermediate or extensive levels of reading in this area. If we remove from this group the lawyers,[87] the number drops to 39.4% or 28. Although 19 of the 67 who reported "none" or "limited" formal instruction in child law reported intermediate or extensive reading (8 did not answer), the majority did not. If we drop the lawyers from the maintenance and property law categories, only 15.9% (11) and 14.5% (10) of the remaining mediators reported intermediate or extensive levels of reading. Few of the mediators reporting "none" or 'low' levels of formal instruction in the legal property and financial areas reported intermediate to extensive reading in the same areas.[88] Again, it appears that the mediators were not remedying a lack of formal legal education by independent, informal study. Again the lawyers' concerns about the mediation practitioners' levels of education and training would appear to be warranted.

The books that mediators had found particularly helpful in practice were most commonly, (15) not surprisingly, books and articles on mediation. The next categories chosen were social work methods (9) (on casework or crisis intervention); and family therapy (6). The ten books, articles, or journals mentioned most often were: J. Haynes, *Divorce Mediation*[89] (19); J. Wallerstein and J. Kelly, *Surviving the Breakup: How Children and Parents Cope With Divorce*[90] (19); L. Parkinson, *Conciliation in Separation and Divorce*[91] (17); R. Fisher and W. Ury, *Getting to Yes*[92] (8); *Family Law* (6); J. Cleves and R. Skynner, *Families and How to Survive Them*[93] (4); S. Maidment, *Child Custody*

87 Barristers, solicitors, legal executives.

88 Four of the 51 mediators who earlier reported limited or no formal instruction in property law reported an intermediate or extensive level of reading in the subject.

89 (1981)

90 (1980)

91 (1986)

92 (1983) This text was written for the general public on effective negotiation strategies.

93 This book was also written for the general consumption and is about ways of dealing with the psychological stresses and strains of family life.

and Divorce - The Law in Social Context[94] (4); J. Howard and G. Shepherd, various articles and *Conciliation, Children and Divorce*[95] (4); D. Saposnek, various articles (3); and Y. Walczak and S. Burns, *Divorce: The Child's Point of View*[96] (3).

The Practitioners' Mediation Experience

We shall complete our introduction to the mediation practitioners with a look at the amount of mediation experience upon which they were basing their opinions.

TABLE 2-10
Mediators: Year of Commencement of Practice

Year	Number	Percentage
1979 or earlier[97]	8	8.4%
1980 or 1981	13	13.7%
1982 or 1983	28	29.5%
1984 or 1985	22	23.2%
1986 or 1987	24	25.3%

As we see, in Table **2-10**, very few of the mediation practitioners (8.4%) had, at the time of this study, more than seven years of family mediation experience.[98] One quarter (25.3%) had just recently started to practice mediation; 66.2% had started practice after 1982. Thus, many of the mediators were relative newcomers to the field. This is a reflection of formal family mediation's recent origins rather than the inexperience of this particular group of mediators. We must keep these levels of experience in mind, however, because there are indications in this study that the lack of mediation experience could cause practitioners to understate the knowledge needed for practice. Twelve of the more experienced mediators commented (without solicitation) that it was only with experience that they had come to appreciate the degree of expertise needed to practice mediation:

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94 (1984) This book is more academic. The author integrates legal analysis and social research.

95 (1987)

96 (1984)

97 One of the practitioners gave 1971 as the year he/she began mediation practice. Two of the remainder started in 1978 and the other five in 1979.

98 68% of the SFLA lawyers reported over seven years of family law experience.

> I would have started off seeing it [custody and access law] as helpful [rather than essential]. I'm afraid when I started conciliation, matters which I now regard as essential, I am afraid to say, I would have regarded as not relevant. (out-of-court conciliator)

> I wouldn't have said yes [to the importance of a particular subject] two years ago. I wouldn't have said yes to a lot of things 2 years ago but I realize now how many resources we are going to need at different times - although a long time ago when I was more arrogant and perhaps less insightful I would have said it all depends on what you pull from your surroundings, but you can't pull from something that isn't there. (in-court conciliator)

These practitioners' comments should be kept in mind when evaluating the mediation practitioners' opinions about the education and training needed by mediators. We should also remember, however, that the mediators had considerable experience helping families with other types of problems and that they reported considerable counselling, therapy, and social work or probation experience. Presumably they supplemented their lack of mediation experience with their experience from these other fields.

As we have mentioned previously, the in-court mediators tended to see more clients in the space of one year than their out-of-court colleagues. Ten (37.0%) of the in-court mediators reported seeing in excess of 60 mediation clients in the previous year compared to 4.9% (2) of their out-of-court colleagues. At the other end of the scale, 29.6% (8) of the in-court mediators reported seeing fewer than 21 families in the previous year as opposed to 75.9% (31) of their out-of-court colleagues.

TABLE 2-11
Mediators: Number of Clients Seen in the Previous Year[99]

	In-Court		Out-of-Court	
No. of Families Seen	Number	Percent	Number	Percent
10 and under	1	3.7%	14	34.1%
11 to 20	7	25.9%	17	41.5%
21 to 40	3	11.1%	6	14.6%
41 to 60	6	22.2%	2	4.9%
61 to 80	2	7.4%	2	4.9%
81 to 100	1	3.7%	0	0
over 100	7	25.9%	0	0

While the out-of-court mediators tended to see fewer clients than their in-court colleagues, they spent more time with their clients when they did see them. While the in-court mediators estimated that they spent a little over an hour on average in mediation with disputants, the out-of-court mediators (excluding those doing property and financial mediation)[100] estimated an average of 3.2 hours. Mediation was very much a part-time occupation for both groups. Only 13.6% (12) of the 88 practitioners who returned questionnaires reported offering mediation more than once a week; the majority (58.3%) were mediating only two or fewer days per month.

Discussion and Summary

As we look back over our profile of Greater London's mediators, we find that it appears that we can safely rely on the mediators' views and opinions drawn from the social-work, mental-health, and counselling disciplines. The mediators reported an abundance of professional experience, formal education, and related reading in these areas. The mediators were less schooled, however, in mediation. While the majority reported moderate to high levels of formal training, and reading in this area, a substantial minority reported minimal theoretical exposure to mediation. We also saw that mediation was very much a part-time activity in Greater London in 1987 and 1988

99 The twenty one practitioners who had not yet completed one full year of practice when they returned their questionnaires have been excluded. Fifteen of these 21 had seen fewer than ten mediation clients.

100 Usually global mediators offer more sessions. For discussion, see Appendix A-1, services 6 and 11.

and that many of the mediators were relatively new to the field. We would therefore expect some of the practitioners to be uncertain about the full parameters of mediation and to lack knowledge of its more technical aspects.

The mediators were extremely weak in legal training, even in the area of child law. With the exception of 9 lawyer-mediators, few were able to report more than a superficial exposure to family law. Their exposure to the law with respect to property division and financial arrangements on separation and divorce was negligible. The mediators' opinions and views about law and mediation must, therefore, be accepted with caution. Mediator views are balanced in this study, however, by those of SFLA family lawyers. The SFLA respondents were experienced family law practitioners with a wealth of settlement experience. We can, therefore, use their views to balance those of the mediators when discussing the legal knowledge needed to settle family law conflicts. The derth of the mediation practitioners' training in law and the inadequacy of their specialized training in mediation, support the validity of family lawyers' concerns about mediator education and training.[101]

We might expect specialized mediation education and training to overcome preliminary professional and educational differences among mediators. Without specialized training, and without exposure to new tools and perspectives, however, we might expect mediators to rely on old tools and perspectives. We shall find indications of this type of reliance throughout this study. We shall also find great variation in the types of mediation the mediation practitioners were offering to the Greater London public during 1987 and 1988.[102] Might inadequate specialized mediator training account for this?

Might education and training problems also account for some of the problems mediation service report having attracting clients? Most of the out-of-court mediation

101 The Department of Justice, Canada (1988a): 18; L. Neilson (1990); University of Newcastle Upon Tyne (1988): 127.

102 See chapter 3 and Appendix A-1.

services in Greater London reported being reliant on client referrals from lawyers.[103] Our SFLA survey tells us that Greater London's family lawyers referred few clients to out-of-court mediation services.[104] On closer scrutiny we find that, while the SFLA lawyers supported mediation as a concept, they were concerned about mediation in practice.[105] They were particularly concerned about the education and training of its practitioners.[106] Perhaps the referral practices of family lawyers would improve if the education and training needs of family mediators were addressed. We shall examine the mediators' and the family lawyers' educational proposals for mediators in chapters 11 to 14.

We might conclude from this section that new entrants to mediation need to be given an opportunity to become familiar with the mediation process before being asked to provide the service. We might also conclude that the lack of preparatory mediator education in the following areas needs to be addressed: mediation theory and techniques; child custody and access law; and the psychological effects of family breakdown on family members. Given the state of mediator education in legal, financial, and property matters, it appears that training mediators to extend their mediation services into legal property and financial areas would be a massive educational undertaking. Alternative suggestions are offered in Chapters 7 and 13.

Before we leave this section several additional points must be made. The first

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103 For particulars, see Appendix A-1. Only one of the out-of-court services reported not relying on solicitors for clients.

104 For a complete discussion of the results of the SFLA survey, see L. Neilson (1990): 235-269. See chapter 1 for research particulars. 76.5 percent of the 153 responding lawyers reported referring fewer than 5 of their clients to out-of-court mediation services during the preceding year. Other researchers have also found low mediation referral rates among family lawyers: A. Bradshaw, J. Pottinger, M. L. Bowen and P. F. Burke (1985): 285; G. Davis (1982b): 11; Department of Justice (Canada) (1988) studies, particularly (1988b): 187-8; M. Dimirsky, (1990): 11; P. McKenry, M. Herrman and R. Weber (1978): 11.

105 L. Neilson (1990): ibid. Other researchers have also found that family lawyers tend to be supportive of mediation as a concept but wary of mediation in practice. See, for example: McKenry, Herrman and Weber (1978); and the Department of Justice, Canada, studies (1988), particularly (1988c), 54: 'Many [lawyers] indicated that they are 'in favour of mediation' but 'dissatisfied with the present system' for the reasons stated: mixed quality of service and delay.'

106 L. Neilson (1990). Similar concerns have been voiced by the solicitors who participated in the Newcastle Report and by Canadian Lawyers. See footnote 101.

is that our mediator education survey provides only a snapshot look at mediator education at a particular time. An appreciation of the education and training that the practitioners had when they offered opinions and suggestions for the education and training of newcomers to the field will help us to evaluate their proposals. The total picture in Greater London, however, was not static. Since 1988 NFCC has been working to upgrade mediator education by the establishment and administration of a core, 45-hour training programme;[107] the Polytechnic of North London has been offering a 22 session, three-hour-per-session, course in mediation since 1986; and the Family Mediation Association now[108] offers a five-day course for lawyers and mediators from the social-work, mental-health, and counselling disciplines who wish to work with one another to provide cross-disciplinary, global mediation.[109] In addition to these efforts, most of the mediation services in Greater London held monthly meetings for case discussions with consultants, or for discussion of new developments in the field. All services were interested in having their practitioners further their education and training in related areas. We cannot, therefore, assume that the mediator education we have examined here has remained static. We do need, however, to keep in mind the practitioners' backgrounds, strengths, and weaknesses as they existed at the time of this study as we look at their educational proposals.

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107 NFCC (1988a); (1988b); (1990): 15.

108 This course was first offerred in July of 1989.

109 Family Mediation Association, FMA Training (June 1989).

CHAPTER 3

Mediation Services in Greater London 1987 - 1988

Introduction

In chapter 2 we looked briefly at the practical experience and the theoretical education of Greater London's mediators. We found that a substantial minority of the practitioners had had but limited formal educational exposure to mediation. We suggested that this might result in a reliance on methods and approaches drawn from other occupations and professions. In this chapter we shall discuss the types of mediation services that Greater London's mediation practitioners were offering at the time of the survey. (A detailed service-by-service description, to which we shall make reference as we proceed, is provided in Appendix A-1.) We shall find that, although all of Greater London's seventeen 'mediation' services purported to offer mediation services to the public, their goals and methods varied greatly. Basically the services were of four major types: therapeutic; mixed therapeutic and conflict resolution; out-of-court conflict resolution; and in-court dispute/conflict resolution. As we proceed through the service descriptions, we need to consider the influences of the mediators' primary occupations and whether or not the methods and approaches being described were drawn from the mediation and conflict-resolution disciplines, or from other pursuits.

In chapter 2 we learned that the mediators working in the in-court mediation services in Greater London were all court-welfare officers. We shall find that these services were almost invariably focused on the interests and needs of children, making them somewhat paternalistic. They offered a settlement process that on occasion resembled adjudication, gave disputants little time to fully explore the matters in

contention, and sometimes placed the disputants under intense settlement pressure.[1] The in-court mediators were hampered by inappropriate scheduling, by the settlement pressures exerted by the courts, and by their own professional duties to protect the best interests of children.[2] As we look at some of the dangers of including mediation in investigative and judicial processes, we shall find that the combination tends to dilute both processes, making each less effective. Our study lends support to the bulk of the English mediation literature which suggests that mediation should not form part of the court process.[3]

We shall also find elements of change. The courts and the in-court mediators were starting to abandon at-the-doors-of-the-court settlement processes. Increasingly the in-court mediators were separating mediation from the courts. Disputants were sometimes being offered mediation sessions away from the pressures of the court environment, in court-welfare offices. This process was being called 'adjourned in-court' mediation. Although adjourned mediation was being used only in a minority of cases, the practice was growing.

Court connections were not the services' most important distinguishing feature, however. We shall find that the in-court mediation services, while pressure-laden and paternalistic, were not qualitatively different from out-of-court mediation services.[4] We shall find even fewer differences between 'adjourned in-court' and out-of-court mediation.[5] The in-court mediators and the out-of-court mediators had the

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1 See in particular, Appendix A-1: Service #2 and 'In-Court Mediation and the Judiciary'.

2 The practitioners' practices and theoretical orientations with respect to the inclusion of children in mediation, will be discussed in more detail in Chapter 5.

3 G. Davis, A. MacLeod, and M. Murch (1982a): 40; G. Davis (1982c): 123, (1985): 7, (1988a); (1988b): 95; G. Davis and K. Bader, (1983a): 627, (1983b); (1983c): 403, (1983d): 10, (1985a): 42, (1985b): 82; Report of the Conciliation Project Unit (1989). This does not necessarily mean that the court-welfare service should no longer be involved in mediation, only that the process should be separated from the judicial process.

4 See also: Family Law Vol. 20 (1990): 410.

5 Compare in particular Services #1 and #3, with the mediation services in Section 2 of Appendix A-1.

same goals and often used the same methods.[6] The major difference among Greater London mediation services was with respect to the inclusion of family therapy. As we shall see, the therapeutic mediation services were qualitatively different: the practitioners had different goals, used different methods, and offered services that bore little resemblance to Greater London's conflict-resolution mediation services.[7] Some of those differences will be explored here. It will become apparent that the education and training needed to provide the two types of services would of necessity be quite different.

For the purposes of this study, the mediators' perspectives and experiences were important. Consequently the discussion of Greater London's mediation services in Appendix A-1 and in this chapter will be descriptive rather than evaluative. As we explore the different theoretical and procedural approaches to mediation, however, we can begin to understand why some of the mediators had such different understandings of the mediation process and the tools needed to carry it out.[8] A review of the service descriptions will also enable us to picture the various theoretical orientations to mediation that are discussed throughout this study.

Greater London Settlement Services Excluded From The Study

Since this study sought the perceptions, opinions, and suggestions of those with family mediation expertise, only those services that purported to specialize in family mediation were included. Services providing community or general mediation to the public but not specializing in family mediation were excluded. Also excluded were services using conciliatory/mediation methods but within other occupational endeavors, e.g.: in family therapy, in the practice of law, and in religious or health care services.

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6 Compare in particular Service #1 (Uxbridge) and the Out-of-Court mediation services in Section 2: Appendix A-1.

7 Compare Services # 16 and 17 with the mediation services in Sections 1 and 2 of Appendix A-1. We discuss the practitioners' views of the appropriateness of therapy in mediation in Chapter 6.

8 The mediators' understandings of the mediation process are explored in chapter 4.

The 'mediation' scheme of the Family Law Bar Association (FLBA) was not included because the service was an arbitration rather than a mediation service.[9] The FLBA process was far removed from the assisted joint disputant decision-making process normally associated with the term 'mediation'.[10] It was clear that FLBA board members would not have much actual mediation experience upon which to base their opinions. The financial and property 'mediation' scheme of Croyden County Court was not included for the same reason.[11]

With one exception, the mediation services offered by non-specialist probation units in Greater London were also excluded, for a number of reasons. In 1987 most of the family work in Greater London was being done by court-welfare officers,[12] not by unspecialized probation officers.[13] The court-welfare and probation officers interviewed for this study estimated that most non-court-welfare probation officers working in Greater London were devoting only five to ten per cent of their

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9 Family Law Bar Association (June 28, 1985a): 624, (1985b): 284, Ancillary Relief and Family Provision - An Introduction (leaflet), Recommendation Procedure Ancillary Relief Rules (leaflet); Family Law Subcommittee of the Law Society (1985): 2322; M. McColl (1985): 269.

10 The Family Law Bar Association Conciliation Board Rules provided that the 'mediator' would provide an impartial recommendation about how and upon what terms disputants should resolve their differences. This recommendation was to be based on legal and financial documents submitted to the 'mediation' board. The disputing parties were not expected to be part of the decision making process. See: Family Law Bar Association, Recommendation Procedure Ancillary Relief Rules.

11 In July of 1987, on an experimental basis, Croyden County Court established a scheme much like that provided by the Family Law Bar Association for ancillary financial and property claims. The purpose of the process was to encourage solicitors and their clients to begin negotiations earlier in the litigation process and to try to ensure that cases would be ready for trial on the dates set for hearing. Each disputant was to submit a summary statement of his or her financial affairs to the registrar at least three days before the appointment. On the date set for the mediation appointment, the parties, with their legal advisors, were expected to attend before the registrar to outline their arguments. The registrar would then indicate his or her view of the case in broad terms and would invite the parties and their lawyers to negotiate further. The registrar was then available in the afternoon to give further guidance or to make any agreed order. If no agreement was reached he or she would give procedural directions for hearing. This information was given to me by several of the registrars of Croyden County Court during an informal meeting. Brentford and Edmonton County Courts in Greater London have now instituted a similar process, see: G. Rose and S. Gerlis (1991): 92-3. A similar process was earlier initiated and discontinued at the Principle Divorce Registry. For a description and research of Divorce Registry process, see: G. Davis and K. Bader (1983a): 627, 679.

12 Court welfare officers are probation officers who specialize in family work and work in specialist units doing only domestic and family work,

13 See, for example: R. Gray, D. Hancock, J. Hutchings (1987): 7.

practices to family law matters. They told me that this was a fairly recent change:

> Years ago much more domestic work was done in the domestic courts. More specialization developed with the move into the county court - perhaps with the new Divorce Act reform of 1969 - so fewer and fewer probation officers in the field have any experience [with matrimonial work], so now unless they get it in a training course, they wouldn't know much about it. In a way we went the other way. (court-welfare officer/conciliator)
>
> The family conciliation work that you can identify as separate from the criminal is virtually nonexistent. Most of our family work is with offenders. I do some supervision orders ... but that is virtually the only family work I am involved in. (probation officer) [14]

In 1987 most of Greater London's family court-welfare services were being provided by specialist court-welfare teams. This does not mean that no domestic work or family-law mediation was being done in non-specialist probation units. Sometimes individuals within probation units developed a special interest in family work. Those interested might then be given most of the family work coming into their units, thereby developing and maintaining expertise in the field. This was certainly the case at Highbury Corner, the one probation mediation service included in the study. It was also the experience of several of the court-welfare officer/mediators interviewed who had recently moved from probation into court-welfare work.

Many of the court-welfare services, notably the Acton and Uxbridge Divorce Units, the Central London Court Welfare Service, the Highgate Divorce Unit, the North-East London Court-Welfare Service, and the Family Courts Service on Richmond Road in Kingston, did not provide family or court-welfare services to the Magistrates' Courts in their respective regions of Greater London.[15] Since not all of the probation services and Magistrates' Courts in Greater London were surveyed, it is not known exactly how many probation units offered mediation in the Magistrates' Courts in 1987.

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14 This quote was taken from an interview with a non-specialist probation officer who did not belong to a mediation service. The interview was taped and transcribed. Except for three probation officers who had formally established an out-of-court mediation service, I did not include non-specialist probation officers in my study. This officer, however, volunteered an interview on the work of probation officers, for which I thank him. The interview was helpful for the contrast it provided.

15 For particulars, see Appendix A-1: Section 1 Services, and Services 13, 15 and 16.

The impression is that if they did so, they did so intermittently or as part of other services, for example as a preliminary stage in court welfare investigations. The only formally constituted mediation service provided by probation officers in Greater London in 1987, made known to me by other mediation practitioners, and not included in this study, was one operating on an in-court basis in the Magistrates' Court at Uxbridge.

The final reason for excluding the mediation services of probation officers was the difficulty that many probation officers seemed to have separating mediation from other functions. It appeared, from the literature, that many probation officers were including child advocacy, settlement seeking during child welfare enquiries, and family therapy in their definitions of 'mediation'.[16] This confusion made it difficult to isolate those probation units and probation officers who were indeed providing family mediation and not something else.

The Mediation Services Of Greater London: 1987-1988

The 17 family mediation services operating in Greater London[17] in 1987/1988 (excluding services established by probation officers in their local offices and in magistrates courts) were as follows: the Acton and Uxbridge Divorce Units of the Middlesex Area Divorce Court Welfare Service (hereafter referred to as 'Acton' and Uxbridge');[18] the Family Courts Service located on Balham High Road (hereafter called 'Balham'); the Family Conciliation Bureau, with its chief office in Bromley (hereafter

16 For example: B. Ahier (1986): 27; J. Howard and G. Shepherd (1987); M. Jones (1986): 20; National Association of Probation Officers (1984) 4.1; J. Pugsley, J. Cole, G. Stein and E. Trowsdale (1986): 164-165; J. Pugsley and M. Wilkinson, (1984): 89-91; P. M. Taylor (1984): 300; M. Wilkinson (1981).

17 Services were counted by reference to the employment of the practitioners and not strictly by the mediation services provided. Many of the services listed had more than one office and many offered mediation in more than one court. Several mediation services thought to be operational in 1987 were found to be inoperative. The Family Welfare Association at Lewisham was considering the possibility of establishing a mediation service but still had not received funding to do so by the end of October, 1987. Another service in Camden, listed in the probation service's records (Association of Chief Officers of Probation, Survey of Conciliation Work - Civil Work Subcommittee [April 1985]) as a joint probation/social-work service mediation service was also found to be inoperative. Two of the probation officers involved hoped to be able to reactivate the scheme sometime in the future.

18 These two offices were re-organized under one administrator during the latter part of 1987 and were included, therefore, as one service.

called 'Bromley'); the Central London Court Welfare Service located at the Royal Courts of Justice (hereafter called 'Central'); the Divorce Conciliation and Advisory Service (hereafter called 'DCAS'); the Havering Family Conciliation Service (hereafter called 'Havering'); the mediation services of the Inner London Probation and After-Care Service at Highbury Corner (hereafter called 'Highbury');[19] the mediation services of the Highgate Divorce Unit (another division of the Middlesex Area Divorce Court Welfare Service but having a separate head) (hereafter called 'Highgate'); the Institute of Family Therapy Conciliation Service (hereinafter called 'IFT'); the Jewish Family Mediation Service (hereinafter called 'JFMS'); the Marriage Guidance Council Family Mediation Service (now called the Middlesex Family Courts Service)[20] (hereinafter called the 'MGFM' service); Mediation In Divorce (hereafter called 'MID'); the Newham Family Conciliation Service (hereafter called 'Newham'); the mediation services of the North-East London Court-Welfare Service (hereafter called 'NELCWS'); the Family Courts Service on Richmond Road in Kingston (hereafter called 'Richmond'); Solicitors in Mediation (hereafter called 'SIM'); and the London Divorce Mediation Agency (hereafter called 'LDMA'). All of them, and the mediators who worked in them, participated in this study. An overview of the services in tabular form follows. For a full description, see Appendix A-1.

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19 This service is also sometimes referred to as the Islington service.

20 National Family Conciliation Council, Newsletter, (December 1989): 15. Should independent services over which the courts have no control be allowed call themselves 'court services'? Does this not give a false impression to members of the public? For a full description of this service, see Service 11 description.

TABLE 3 - 1
Overview of Greater London's Mediation Services

Service	Year Began	Court Connection[21]	Number Mediators Total	In study
In-Court Conflict Resolution Services:				
#1-Uxbridge	1983[22]	Yes, in	2	1
#1-Acton	- [23]	Yes, in	3	3
#2-Central	1983	Yes, in	11	10
#3-Highgate	UK[24]	Yes, in	4	4
#4-Richmond	1984	Yes, in	6	6
Out-of-Court Conflict Resolution Services:				
#5-Bromley	1979	Limited - out[25]	19	19
#6-DCAS	1980[26]	No	6	5
#7-Havering	1986	No	4	3
#8-JFMS	1986	No	13	11
#9-MGFM	1986[27]	No	12	12
#10-Newham	1977[28]	No	1	1
#11-SIM	1986/7	No	6	6
#12-LDMA	1987	No	3	1[29]
Services Focussing on Conflict Resolution But Incorporating Therapy Or Using Therapeutic Methods:				
#13-Highbury	1985	Yes, out	3	3
#14-MID	1983	No	6	6
#15-NELCWS	1982/3	Yes, in	6	6
Therapeutic Services:				
#16-Balham	1980 court/1983 service[30]	Yes, out	3	2
#17-IFT	1983	No	4	4

21 The services are classified as "yes" if they had close court connections, as "yes, out" if they had close court connections but offered most of their mediation sessions off court premises, as "in" if they usually practised mediation on court premises, and as "no" if they were independent of the courts.

22 Most of the members of the Middlesex Court-welfare service (with offices at Uxbridge, Acton, and Highgate) (services #1 and 3) and the Marriage Guidance mediation service (#9) began to practice mediation much earlier under the auspices of what was formerly known as the "Barnet" mediation service. "Barnet" operated independently of the courts. It was discontinued in 1986. For particulars, see Appendix A-1.

23 See footnote 22. In 1987 the Acton office was providing mediation services to two courts on an informal, occasional basis.

24 I do not have this information.

25 During the course of this study, this service began to establish closer connections to the courts but almost all of its mediation continued to be conducted off court premises.

26 This service originally offered separation and divorce counselling. Mediation was added later.

27 See Table footnote 22.

28 This date was given to me by the service's administrator. I do not have independent verification so I cannot be sure that the date is correct.

29 All three of the mediators were interviewed, but only one was interviewed about this service.

30 This court began to offer in-court mediation services before the specialized court-welfare unit was created. There is some confusion over the date Wandsworth County Court first began offering in-court mediation. G. Davis and K. Bader (1983d): 10 have the date as February of 1981 but Registrar Price maintains he started the service in 1980: D. Price (1989): 278.

TABLE 3-1 (continued)

Service	Court Reports[31]	Scope of Issues[32]	Children[33]
In-Court Conflict Resolution Services:			
#1-Uxbridge	Yes, separate	child issues only	sometimes
#1-Acton	Yes, separate	child issues only	sometimes
#2-Central	Yes, separate	child issues only	usually
#3-Highgate	Yes, separate	child issues only	often
#4-Richmond	Yes, separate	child issues only	often
Out-of-Court Conflict Resolution Services:			
#5-Bromley	Limited, separate	normally limited to child	seldom
#6-DCAS	None	global	seldom
#7-Havering	None	child and maintenance[34]	offered[35]
#8-JFMS	None	child issues only	seldom
#9-MGFM	None	usually limited to child	variable[36]
#10-Newham	None	child issues only	sometimes
#11-SIM	None	global	offered
#12-LDMA	None	child focus, some global	offered
Services Focussing on Conflict Resolution But Incorporating Therapy Or Using Therapeutic Methods:			
#13-Highbury	Yes, separate	child, some global	usually
#14-MID	None	child, sometimes global	sometimes
#15-NELCWS	Yes, combined	child issues only	usually
Therapeutic Services:			
#16-Balham	Yes, combined	child issues only	commonly[37]
#17-IFT	None	child, some global	often

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31 "Yes" means the mediators also conducted court welfare investigations for the courts. "Limited" means some but not all of the mediators did welfare investigations for the courts. "None" means that the service did not have court connections. "Combined" means the service did not separate the mediation and court-welfare investigation processes. "Separate" means the service kept the two processes separate. Services that separated mediation from welfare investigation often included conciliatory family meetings in the latter. For discussion of the differences between the two processes and for particulars of the service connections, see Appendix A-1.

32 The practitioners' practises of and opinions about global mediation are discussed in chapter 7.

33 The practitioners' practises and views about the inclusion of children in mediation are discussed in chapter 5.

34 None of the mediators offered property mediation. There was some disagreement within the service. Some of the mediators did not feel comfortable handling maintenance.

35 This service had not had enough experience to allow classification.

36 Practice varied substantially by mediator within the service.

37 By 1988 children were usually included.

(Table 3-1 continued)

Service	Mediator Backgrounds	Approach
In-Court Conflict Resolution Services:		
#1-Uxbridge	court-welfare officers	conflict resolution
#1-Acton	court-welfare officers	conflict resolution
#2-Central	court-welfare officers	conflict resolution
#3-Highgate	court-welfare officers	conflict resolution
#4-Richmond	court-welfare officers	conflict resolution[38]
Out-of-Court Conflict Resolution Services:		
#5-Bromley	mixed, cwo,[39] law, mental health	conflict resolution
#6-DCAS	mixed, magistrates, mental health	crisis intervention[40]
#7-Havering	court-welfare, mental health	conflict resolution
#8-JFMS	mixed, court-welfare, mental health	conflict resolution
#9-MGFM	primarily marriage counsellors	conflict resolution
#10-Newham	probation, mental-health	conflict resolution
#11-SIM	law & mental health	conflict resolution[41]
#12-LDMA	mental health & law	conflict resolution
Services Focussing on Conflict Resolution But Incorporating Therapy Or Using Therapeutic Methods:		
#13-Highbury	probation officers	mixed[42]
#14-MID	court-welfare, mental health	conflict resolution[43]
#15-NELCWS	court-welfare officers	mixed
Therapeutic Services:		
#16-Balham	court-welfare officers	therapeutic
#17-IFT	family therapists	therapeutic

38 Several members of this service said that they thought many families need more help than that provided by mediation and conflict-resolution.

39 Court-welfare officers.

40 This service classified its own services as being oriented to 'crisis intervention'. The service regularly moved from individual counselling into mediation. For particulars, see Service #6, Appendix A-1.

41 Members of this service were prepared to include time-limited counselling.

42 This service practised conflict-resolution but was prepared also to offer short-term therapy as part of the process.

43 The members of this service had adopted some therapeutic perspectives making the service difficult to classify. Generally, the service offered conflict-resolution with therapeutic overtones.

TABLE 3-1 (continued)

Service	Hours of Operation	Mediator Practice[44]	Referrals[45]
In-Court Conflict Resolution Services:			
#1-Uxbridge	1 day every 2 weeks	singly	court
#1-Acton	at court request	singly	courts
#2-Central	2 days per week	singly	court
#3-Highgate	1 day per week	singly	court
#4-Richmond	1 day every 2 weeks	singly or pairs	court
Out-of-Court Conflict Resolution Services:			
#5-Bromley	1 & days per week	2, male & female	solicitors, cws[46]
#6-DCAS	daily	two or singly	self, cws, magistrates
#7-Havering	by appointment	singly	solicitors
#8-JFMS	1 day per week	2, male & female	solicitors, charities
#9-MGFM	1 day per week	2 females	cws, solicitors
#10-Newham	by appointment	two	solicitors, ps,[47] court
#11-SIM	by appointment	2-law and mental-health	solicitors
#12-LDMA	by appointment	2 females	solicitors
Services Focussing on Conflict Resolution But Incorporating Therapy Or Using Therapeutic Methods:			
#13-Highbury	by appointment	two females	court
#14-MID	2.5 days per week	1 or 2 females	solicitors
#15-NELCWS	1 day per week	singly or pairs	court
Therapeutic Services:			
#16-Balham	daily[48]	singly plus team	solicitors, courts
#17-IFT	1 day per week	singly plus team	solicitors

Table 3-1 tells us that the majority of the mediators participating in this study (57, or 55.9%)[49] worked in out-of-court, conflict-resolution based mediation services. Twenty-one (20.6%) worked in therapeutic or mixed therapeutic/conflict resolution services and another twenty-four (23.5%) mediated in the courts.[50] Most of

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44 Only the services' most common mediator practices are listed. For particulars and discussion of the mediators' preferences, see Appendix A-1 throughout, and particularly Service #15.

45 Only the services' major sources of clients are listed.

46 Besides solicitors, and the court-welfare service, Bromley also had referrals from the courts and some disputants came directly.

47 Probation service.

48 This service did not separate 'mediation' and family therapy, but included both in the term 'family work'. The service was engaged in 'family work' on a daily basis.

49 One mediator worked in two out-of-court, conflict-resolution mediation services. That mediator has been counted once.

50 When we discuss the practitioners' views of the parameters of mediation in Chapters 4, 5 and 6, we shall find that there were shades of agreement and disagreement within each division. For example, most conflict-resolution mediators did not ignore or negate the emotional, psychological, and social components of conflict. The divisions were of emphasis or shade, they were not absolute.

the mediation practitioners, therefore, focused on conflict-resolution rather than family therapy. We shall need to keep these numbers in mind as we discuss the practitioners' understandings of the mediation process, and the education and training needed to carry it out, in the ensuing chapters. Immediately, however, we shall examine some of these differences. Let us first examine the in-court mediation services.

Mediation In The Courts

Description Of Process

When we examine the in-court mediation processes described in detail in Appendix A-1 (Services 1, 2, 3, 4, 15 and 16) we find that, for the most part,[51] the in-court mediation processes used throughout Greater London in 1987 and 1988 were similar. Normally the courts issued a notice asking family law disputants and their legal advisors to appear before a member of the judiciary (a registrar) on the court premises at an appointed date and time. These notices made the process appear mandatory.[52] The disputants were asked to bring with them all children over a specified age.[53] At the appointed time the disputants with their legal advisors appeared before a registrar and a court-welfare officer. The disputants' children waited outside in court hallways. None of the courts provided supervision or facilities for them. The in-court mediators had many complaints about the pressures that court facilities were placing on these children.[54] The disputants (normally the parents) and their legal advisors met with the registrar and a court-welfare officer in the registrar's office or in a court room for between 5 and 10 minutes. During this time the registrar and the lawyers isolated the legal matters in contention and the court signified its approval of settlement. At the end of this process the disputing parents were asked by the registrar to meet privately with the court-

51 Some of the registrars working with the mediators in Service #2 worked differently from the process to be described here. For particulars, see Appendix A-1, Service #2.

52 See services 1, 3, 4, and 16, Appendix A-1.

53 The ages varied on a court by court basis from 5 years of age to 11. For particulars, see Appendix A-1, Services 1, 2, 3, 4, 15, and 16.

54 See in particular Services 2 and 3 in Appendix A-1. See also chapter 5.

welfare in attendance to try to work out some sort of settlement. The registrars commonly presented court alternatives in an ominous light.[55] The court-welfare officers then had between one-half and two hours (usually one hour)[56] to interview the parents and the children, and to see if some sort of agreement could be reached.

The in-court mediation programmes were limited to child issues. During the private meetings most court-welfare officers tried to create agreements by focusing the disputants' attention on the needs and interests of their children. Several of these private meetings are described in detail in Appendix A-1, Services 1 and 3. During these meetings the officers were careful to maintain an appearance of neutrality between or among disputants, and used a variety of dispute- and conflict-resolution techniques. Because so little time was allocated to the in-court mediation process, however, full exploration of the disputants' concerns was not often possible. The in-court mediators complained that the time pressures of the in-court process sometimes caused then to use the views of children to pressure the parents into adopting particular courses of action:

> My confusion [about the inclusion of children is] about in-court. If they come, we will invariably see them if only for a moment. But because it is more heightened and because you are monitoring something which is moving far more quickly I have a little difficulty sorting out what I think of children being brought into that process directly. The pressure on children gives [them] a push into the decision making role because we are only talking about one hour at the most ... I still think it is important to see children, to know how they feel and what their positions are but putting them into a heightened, quicker procedure, it is far easier to cross over to the children being the decision makers. It is much easier to control that when you are talking about a lengthier process. (court-welfare officer/in-court conciliator)

All of Greater London's mediators, including those working in the courts, identified the in-court mediation process as being more directive and coercive than mediation conducted off court premises. For example:

> Many courts that have in-court conciliation are really trying the old at the court room door settlement: the you be reasonable argument. And they allow about one quarter hour. Now you have a couple of people

55 See in particular Services #1, 3, 4, and 16, Appendix A-1.

56 See chapter 2.

> whose marriage has broken down and they haven't been able to discuss things properly for 2 to 6 years, who have an awful lot of anguish and misunderstanding to get off their chest. What on earth you think you can do in a quarter of an hour and telling people to be reasonable! I don't know. It seems to me to be a total nonsense and I don't call that conciliation. (registrar)

> [In-court and out-of-court mediation both] have a part to play. If people need therapy, if they need more time, then definitely out-of-court, but some people - you could give them years and years and sometimes they just need the pressure and the authority [of in-court mediation]. Some people respond to the authority of the registrar. It is somewhat paternalistic but it has its benefits. (in-court conciliator)

> A purist would probably say what we are doing is not conciliation - in the sense it isn't just letting the parents just work it out for themselves. There is a good bit of reality put in by the court-welfare officer and registrar and one might say, "If you want my honest opinion, here is what would happen if you went before a judge." .. whether that is arm twisting or not ... There is a good bit of input by the court welfare officer and registrar who are using their authority and experience to hopefully shove the parents on a bit from rigid positions. I don't think it is unfair but whether if is actually conciliation or not is an interesting thought. (in-court conciliator)

At the end of the private meeting with the court-welfare officer, everyone (with the exception of the children) reappeared before the registrar to inform him or her of the outcome of the private discussions. At this point some registrars exerted pressure on the parents to accede to the children's wishes. On these occasions the process became adjudication:

> Some [registrars] change ... as they read the situation. One registrar was anything but conciliatory in apparent terms because after initial discussion ... he would say, 'well it seems to me that we aren't getting anywhere because of this and this' and 'It seems to me that this is what should happen' and he gave the order there and then - and they will accept it because he read them correctly. They can't make the decision but if someone makes it for them, they are thankful. (in-court conciliator speaking of an in-court mediation session)

For other examples see: *In-Court Mediation and the Judiciary* in Appendix A-1.

Occasionally it appeared that 'agreements' reflected less disputant consensus than disputant resignedness to court direction. These 'agreements' were immediately turned into court orders. The disputants had little time for reflection. Occasionally, if the disputants were reluctant to agree to a particular course of action, the registrars gave

them an opportunity to try an arrangement on a trial basis and a further mediation appointment might be scheduled. When no agreement was reached in the sessions, the registrar usually ordered a court-welfare investigation. A request for a court welfare report (see Appendix A-1) could lead to further mediation sessions, the family being given therapy, or to a full welfare investigation and all manner of processes in between. Clear national guidelines concerning the preparation of court welfare reports are needed. Most court-welfare units in Greater London (Services 1, 3, 4, 15, and 16, Appendix A-1) included a mediation-like, settlement-seeking process within the investigative processes but, with the exception of services 15 and 16, the services separated mediation from investigation and were clear about the differences between them.

When we compare the in-court to the out-of-court mediation services, (Section 1 mediation services with the mediation services in sections 2 and 3, Appendix A-1) we find the out-of-court mediators telling disputants that they were under no obligation to mediate; that they could withdraw from the process at any time; and that any decisions reached would be their own, not imposed upon them. We find mediation sessions being held in informal surroundings, away from judicial pressure, often complete with tea and biscuits. We find a reluctance to include children, directly or collaterally, in the decision-making process. And we also find the mediators spending more time with the disputants: between 3 and 9 hours in child mediation and between 3 and 15 hours in global mediation. The out-of-court mediators gave disputants the opportunity and time to explore and to attempt to resolve their conflicts. The in-court mediators had time only to try to patch legal disputes. It is clear, from the service descriptions, that the in-court mediators exerted far more pressure and coercion on the disputants than did the out-of-court mediators.[57]

Not surprisingly then, very few of Greater London's mediators preferred the in-court to the out-of-court mediation process. In spite of the fact that twenty-four of

57 See Appendix A-1.

Greater London's mediators conducted most of their mediation in the courts, only four preferred the process to out-of-court mediation. Fifty percent of the 100 mediators who commented on the issue said that they thought mediation should always be conducted away from court premises because of the pressures involved in the in-court process. The remaining forty-six per cent endorsed the need for both types of mediation services. While few of the mediators thought in-court mediation a better process, a bare majority were willing to accept the continuance of the service. Why? Let us explore the advantages and disadvantages of the two settings in more detail.

Advantages and Disadvantages of Mediation In The Courts

As we examine the in-court mediation programmes in Greater London in Appendix A-1, it is important to remember that people attending the out-of-court mediation services did so voluntarily, while, to all intents and purposes, attendance at in-court mediation was involuntary.[58] Thus the in-court and the out-of-court mediators were serving different segments of the public. Are court litigants the most suitable candidates for mediation? We know that the courts do not decide the majority of family law disputes.[59] Researchers in England have found that less than 13% of family law cases lead to child custody or access trials. (The figures range from 2 to 13%.)[60] The Interdisciplinary Committee on Conciliation (1983) found that only 11% of the Divorce applications in England were giving rise to applications to the courts concerning

58 See Appendix A-1, Services, 1, 2, 3, 4, 13 and 16.

59 O. Stone (1978): 246

60 R. Dingwall, (1986b): 75 estimated that contests in custody and access were occurring in no more than 10 to 15% of cases. J. Eekelaar (1982): 63, found that only 6.9% of English cases were classified as being contested on custody or access at the time of hearing. The Law Commission (1986): 20, states that only 3% of the applications for custody in magistrates courts were contested to hearing. S. Maidment (1976b): 237, noted custody was contested in 13% of the cases she was examining. In (1984) she noted that 94% of parents agree on arrangements for child care after divorce. The Report of the Interdisciplinary Committee on Conciliation (1983): 6 states that: "On average only about 6% of the actions started in the high court get as far as being set down for trial and less than 2% are actually tried."

These figures do not mean, however, that the remaining cases are amiably settled by and between disputants. T. Bishop (1987): 9 suggests that most cases are settled, not by judges, but by lawyers who 'serve it on their clients'.

children. Many disputes about the post divorce care of children, perhaps even the majority, are settled in bilateral negotiations between the disputants with little or no professional help.[61] Are the remaining 11% of divorcing or separating parents who submit their child disputes to the courts appropriate candidates for mediation?

If, as we shall hear the practitioners suggesting in chapters 4 and 5, the cornerstone of mediation is disputant autonomy (the right of the disputants to arrive at their own solutions rather than having solutions imposed on them) then the process must require a certain amount of disputant stability and rationality. When Greater London's mediation practitioners were asked an open-ended question about the circumstances in which mediation would not work, over 50% said with parents having mental illness and or serious emotional difficulty accepting the breakdown of the marriage.[62] Forty-five percent said that mediation could not work when the welfare of children appeared to be threatened, only three were prepared to continue mediation in the face of allegations of child abuse,[63] and 19% said that they did not think mediation appropriate for families with a history of family violence.[64] Do people who submit their disputes to the courts fall within the stable, or the latter categories?

Many of the in-court-mediators noted that the proportion of their in-court

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61 See footnote 60. See also: Appendix to H. McIsaac (1983): 57; R. Cavenaugh and D. Rhode (1976); R. Miller and A. Sarat (1980-81): 525.

62 See also: J. Blades (1984): 92; D. Brown (1982): 29; E. Brown (1985): 91; G. Davis (1983): 137; Department of Justice, Canada (1988a); T. Fisher (1990c): 126; J. Fuhr (1989): 71; L. Gold (1982): 48; L. Hann (1987): 29; H. Irving and M. Benjamin (1983): 65; J. Johnston, L. Campbell, and M. Tall (1985): 120-127; J. Kelly, L. Gigy and S. Hausman (1988): 453; K. Kressel, F. DeFreitas, et. al., (1989): 61; C. Leick (1989): 39; M. Little, N. Thoennes, et. al. (1985): 4; H. McIsaac (1987): 48; L. Parkinson (1985b): 262; M. Roberts (1988): 107; A. Salius and S. Maruzo: 168; N. Tan (1988): 56.

63 If arrangements for protection were possible. See Appendix A-1, service 13.

64 No suggestions were offered. These are the responses most commonly given. The responses reflect the situations uppermost in the mediators' minds. Failure to specify a category does not mean that the mediator would not have endorsed that category had attention been drawn to it. The mediators were not limited to one answer. The issue of the suitability of mediation for families with a history of violence, is controversial. See, for example: E. Brown (1988): 134; S. Chandler (1985): 346; A. E. Cauble, R. Appleford et. al. (1985): 27; K. Cloke (1988): 77ff; A. Davis and R. Salem (1984): 17;; Department of Justice, Canada (1988 a,c); S. Erickson and M. McKnight (1988b): 3; L. Girdner, (1990): 365; L. Hann (1987): 29; B. Hart (1990); H. Irving and M. Benjamin (1987): 185; J. Johnston, L. Campbell and M. Tall (1985): 112ff; K. Kressel (1987): 225; C. Leick (1989): 39; M. Little, N. Thoennes, et. al. (1985): 4; D. Marthaler (1989): 53ff; D. Saposnek (1983): 254; Solicitor's Family Law Association: 125.

mediation cases involving serious welfare allegations was increasing:[65]

> There are perhaps some - perhaps difficult to identify - disturbed parents where the process can spark off some really quite serious incidents ... There is an increase of those. The people who are reasonable and prepared to compromise get creamed off elsewhere and the more disturbed intractable problems are left to be dealt with in the [in-court] conciliation lists. (in-court conciliator)

> If we are only seeing 11% of clients then almost by definition we are getting clients who are not at a stage in development where they can be effective in conciliation so you could almost argue that the people who most need conciliation are the people least able to do it. (in-court conciliator)

If in fact the majority or even a sizeable minority of child dispute cases being filed with the court involve serious allegations of abuse or complaints about children's welfare, or parents with serious psychological difficulties, perhaps mediation is not the best process. If family courts become heavily involved in informal dispute resolution, either at the expense of investigation and adjudication, or by mixing the processes, what happens to protection of children?

Could child protection, and the type of cases being submitted to the courts, account for some of the coercion and direction observed in the in-court mediation process in Greater London?[66] All of Greater London's in-court mediators were court-welfare officers.[67] Did this professional background also affect the type of mediation offered? In chapter 2 we learned that a substantial minority of the mediation practitioners had had but limited formal educational exposure to the concept of mediation. We also saw that this was particularly true of the in-court mediators.[68] Without mediation training, we expected mediation practitioners to rely on perspectives and methods drawn from other professional endeavors. Was the in-court mediators' lack of mediation training causing them to rely on court-welfare perspectives and

65 Even though the mediators were not asked a direct question on the issue, a sizeable minority of the mediators (53% of the in-court-mediators) spontaneously mentioned this perception.

66 See in particular Services 2, and 16; and 'In-Court Mediation and the Judiciary' in Appendix A-1.

67 See chapter 2.

68 See also: J. Kingsley (1990): 189.

approaches?

A review of the mediation and court-welfare service literature tells us that the protection of the welfare of children is the predominant professional concern of court-welfare officers in England.[69] During the course of this study, all of Greater London's mediators were asked to identify the client in or the focus of the mediation process. Sixty-three percent of the court-welfare officer mediators identified children as their client or focus in mediation. Only 17.4% identified the parents; the remainder said the family as a whole.[70] When we compare these answers to those given by the non-court-welfare officer mediators, all of whom mediated in independent services away from the courts, we find that only 23.1% identified children as the client or focus, that 46.2% identified the parents, and the remainder the family as a whole. We begin to see here the influence of professional background. Professional duties to children had caused court-welfare services 14 and 16, Appendix A-1, to abandon confidentiality and much of the disputant autonomy normally associated with the mediation process. The officers argued:

> We have dropped the term 'conciliation'. The President of the Family Division had defined conciliation as something which is both voluntary and privileged and as court-welfare officers it is very doubtful whether we can be engaged in anything which is privileged when the best interests of children are our primary objective ... We don't call it anything. Whether we have a referral from the courts, from social services, or whether they walk in from off the street, we have the same objective - the objective being to reestablish their [the family's] ability to negotiate with each other [and] to take decisions for themselves. We don't apply a label to that really. (court-welfare officer/out-of-court mediator)
>
> From the point of view of conciliation as seen by the NFCC, where the parties are coming voluntarily and the conciliator has only one task, to

69 G. Davis (1987): 299; C. Clulow and C. Vincent (1987): 98; R. Gray, D. Hancock and J. Hutchings (1987); J. Kingsley (1990): 183. See also: B. Cantwell (1986): 278-280; J. Howard and M. J. Jones (1987): 70; C. Jackson (1986): 357; J. Kingsley (1989): 202-3; P. M. Taylor (1984): 301. As we see in Appendix A-1, services 3, 4, 13, 14, and 16, this is often expressed as desire to have the parents accept continuing joint parenting responsibility for the children after the reorganization of the family.

70 The answers 'parents' or 'children' were offered as suggestions. Mediators who choose 'the family as a whole' rejected both suggestions, adding this as their own category. Had the 'family' been offered, many would have chosen this alternative. The category was purposely not offered because I wanted to look at child advocacy.

> act as a catalyst; while I think it is appropriate for us ... to use a conciliatory approach, we have a special task and the parties have to be aware of this. If they reach an arrangement suitable to the court that is fine, but if they agree on an arrangement which is seen by the professional court-welfare officer as being not appropriate, then one has to say that ... We don't conciliate as a conciliation service would but what we tend to do is to get the whole family in and we see them as a family unit and what we try to do is to get the parents to acknowledge their parenting responsibility and to get them to go on accepting their responsibility as parents. If we can get an agreement ... and we believe that agreement is in the best interests of the child then we would prepare a very limited report (court-welfare officer/in-court mediator) [71]

The other court-welfare/probation mediation services (see services 1, 2, 3, 4, and 13, Appendix A-1) offered confidentiality in mediation but officers in each unit reported difficulty balancing their duties as mediators with their professional duties as protectors of children's welfare:

> There are a lot of my divorce-court-welfare colleagues who feel that if the parents reach an agreement, it is far too paternalistic for you to be given a role which challenges their parental decisions. It seems to me to be a phoney argument ... My position is that you hold a nasty tension between your genuine wish to empower the parents, to recognize that they are often good enough to make these decisions and the other bit: that you cannot jettison the whole welfare role on the other. It is a very nasty equation to hold, but I don't think it is solved by throwing one of the bits of that equation out of the window. (in-court conciliator)

Certainly in most instances, the coercion observed during in-court mediation in Greater London[72] or described by the in-court mediators was being exercised on behalf of the children. For example:

> If you took the view that you were never going to exercise your authority but simply use your persuasive powers, you wouldn't have got a result without a contest in court and without a long period of delay. But what you got was an arrangement which was in the best interests of the children and it was achieved within a month. (registrar)

> [The children are] not really part of conciliation but may be used as part ... For example, father may be saying he wants to see them every week and mother and the child can't take it: the child is saying, "But I have cubs, ecetera. Once every three weeks would be fine." And you ask the child, "Have you been able to say this to your parents?" If he says, "yes, but they won't listen," then it is easy to go and say, "so and so has said

71 This officer worked in a service that combined mediation and court-welfare reports. For discussion of the connections between mediation and court-welfare investigations in mediation services throughout Greater London, see: Appendix A-1.

72 See Appendix A-1.

> this, why are you having so much trouble?" Then you can bash quite hard for what the child has said. I have to confess I exert more pressure on the parents; I do pressure parents to get what the children really want, no doubt about it. (in-court conciliator) [73]

In addition to parental coercion, the in-court mediation process also exerted a great deal of pressure on children. Although we shall be discussing the issue of children in mediation in Chapter 5, it is important to note here the methods used by in-court mediators to include children in the mediation process. In Appendix A-1 and in chapter 5 we find examples of children's comments being used during the in-court mediation process to pressure the disputing parents into making certain decisions. Sometimes the in-court mediators and registrars became advocates for the children. Sometimes children were asked to confront their parents directly, sometimes the registrar or in-court mediator did this for them. The out-of-court mediation services, however, tended to include the children later in the process, if at all, after the parents had reached tentative agreement; (see Appendix A-1, Services 5, 8, 11, 14, and 17) or the services were giving the children support and assistance unrelated to the decision-making process (see Appendix A-1, services 8 and 14). The independent out-of-court services were less apt than the in-court mediation services to involve children in the decision-making process. The in-court mediation process not only exerted more pressure on the disputing parents than did the out-of-court mediation process; it also placed more pressure on the children.

This pressure on the children came not only from the methods the in-court mediators used to include children, but also from the court premises. As we see in Appendix A-1, none of the courts provided facilities or supervision for the children during in-court mediation processes. The in-court facilities for children were frankly appalling. While most of the in-court mediators were in favour of children being involved in the mediation process in some way, the majority considered the in-court facilities inadequate:

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73 For further discussion of mediation and child advocacy, see chapter 5.

> I'm not sure the court is the right setting. It must be extremely daunting to come before the court and you've got to see this lady from the welfare. That must really be quite terrifying ... so although I see the benefits of children being involved in the discussions. I would like to know what they think. Normally when you do say, "Do you find this difficult?", the answer is "yes". (in-court conciliator)

> I would like to have lots of equipment for the children to play with and to have someone in authority to keep an eye on things ... I don't think they should sit outside in the hall way ... I feel for the children because there are other cases going on and you have a long corridor and there are lots of people. The other day I was taking a little girl upstairs to talk with her because we had no rooms and there was a woman howling her eyes out here and another woman with red rimmed eyes. Children do see adults cry but to see it in that setting, knowing all this is going on and that your life is also being affected ... I don't like to see this, grown up as I am: to see someone sobbing their hearts out ... It does look frightening for the little ones. (in-court conciliator)

The pressures on children created by this in-court settlement process is bound to be intense. The short and long term effects of this pressure should be studied and evaluated. Is settlement worth the price?

While in-court mediation exerts considerable pressure on disputants, and employs coercion, and while we might question whether or not the process can accurately be called 'mediation',[74] nevertheless we must also consider whether or not the courts should act differently. Should courts hearing family matters abandon protective, if somewhat paternalistic, social functions in favour of promoting disputant autonomy and settlement? The protection of child welfare runs through the whole of the court's involvement in family law.[75] What other social mechanism do we have for protecting children when parents do not or cannot act in their children's' best interests? The adversarial process, with its investigation abilities, its procedural and evidentiary rules, appears to be better suited to child protection than settlement-seeking and mediation. Some of Greater London mediators worried about the dangers posed by court abandonment of its traditional roles in favour of settlement seeking. The mediators said they depended on the courts to prevent the injustices which could arise with disputant-

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74 G. Davis and K. Bader (1985a): 45.

75 S. Cretney (1984): 323-339; and section 1, Children Act 1989.

decision making in mediation:

> The danger is - it has been shown in social work - if you reduce the importance of things like the rules of evidence, you are diminishing the role of law, which is the keystone of any democratic society: the right of access to the courts. It is all very well to say it is inappropriate but if you take it away you may find what you are left with is also inappropriate ... I am against any star chamber ... In conciliation you could have a power imbalance; they must have the right to go to a solicitor and say I am being diddled because I am not a good negotiator - she must have recourse to the court. (out-of-court mediator)

> We had a couple [in for a mediation session] who seemed very reasonable. Everything seemed very equal ... It seemed very equal to begin with, but as the session went on both conciliators felt, though we didn't consult at the time, that the man was really quite mentally sick - but very nice, calm, considerate. We both felt if he got a better solicitor than she did, he'd win and I heard that in fact she lost care and control [of the children]. This is where we are so impotent because we have no right to give that information out. It gave us a hard time ... *[Wasn't there a court welfare investigation?]* A court-welfare officer tried to conciliate because they were living in the same house ... even though counsel asked for a high court welfare report ... [Fortunately later the children were referred to a therapist but] the child psychologist is saying they are the most disturbed children she has ever come across. (Out-of-court conciliator)

Mediation and the investigative 'adversarial' processes are needed for certain people, at certain times, for certain disputes. It is important that the promotion of one process does not lead to the abandonment or weakening of the other.

Given these problems with in-court mediation, why, then, were so many of Greater London mediators willing to tolerate or even endorse the continuance of the service? Are there advantages to having mediation integrated into court proceedings? The mediators who supported in-court mediation pointed out that the process did have the advantage of making legal information, from the registrars and from the disputants' legal advisors, readily available to the disputants during the process. In Appendix A-1 we find that few of Greater London's mediation services involved lawyers in mediation. (For an exception, see Service 11.) While lawyers did not usually participate in the private mediation sessions with the court-welfare officer during the in-court mediation

process, they were available on court premises.[76] In chapter 2 we found that few of Greater London's mediation practitioners had legal training. We know, from a recent survey of family lawyers in Greater London, that lawyers fear that mediators do not have adequate legal training.[77] The availability of legal information in the in-court mediation process may well, therefore, be important.

The mediators also pointed out that having mediation part of the court process exposed people to mediation who would not have been exposed to the process if the service was entirely voluntary.[78] For example:

> Most conciliation should be out-of-court and people should come here [to in-court-conciliation] only if they refuse to go to out-of-court. Then they should be ordered to come to in-court-conciliation. If at that session they say, 'we are not prepared to conciliate', I don't think you can take sanctions against them but at least it gets them there and maybe when they are there they will give it a go and it is still better than having their fight in court. (in-court conciliator)

Other mediators argued that the proximity of the registrar and the court helped to produce agreements:

> In-court .. you know you have an hour, come back with an agreement or it will go forward for trial. ... The advantage of the pressure is the fact that if they don't agree, there will be a full blown hearing with lots of time, money, pressure. And so people agree to things there, they might not agree to otherwise. That is the process. It does put people under pressure and people agree to things they wouldn't do if not in a court setting. (in-court conciliator)

And several mediators mentioned the fact that in-court-mediation was faster and therefore did not create delays:

> We are quicker [in-court] and that is of crucial importance to families. Who likes to be in the clutches of a social worker while they waffle away with their so called conciliation and therapy and it takes nine frigging months to come to court. Parents have the right to expect to have the decision made within a reasonable time. We know that parents find this time consuming business absolutely unbelievable. If I was a parent, I wouldn't want a social worker near me. (in-court conciliator)

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76 For further discussion of the practice of Greater London's mediation services with respect to the inclusion of lawyers in the process, see Appendix A-1, particularly service 1 at Acton.

77 L. Neilson (1990). See also: Department of Justice (Canada) (1988a): 18; University of Newcastle Upon Tyne (1989): 127.

78 For discussion of the advisability involuntary mediation, see chapter 10.

In-court mediation also offered the advantage (to some disputants and to the courts) of having agreements made legally enforceable immediately:

> Out-of-court you can't exercise authority and the agreement lacks the force of a court order. Even though the parties may agree outside - they know that the agreement does not have the force of a court order. It is just an agreement and if they breach it, so what? So what if they take them to court? But in court it is not only between them. We immediately make a court order and it is made perfectly clear to everyone that this is now a court order. (registrar)

If the only goal of mediation is to process disputes quickly and inexpensively, this last argument has considerable merit. If it is necessary to include the court as a third party to mediated agreements, however, we must question the consensual nature of these 'agreements'. If true disputant consensus is lacking, does not the process begin to resemble adjudication without procedural and investigative safeguards? Is this an appropriate role for the courts? Might this not lead to a swing away from informal settlement processes to greater reliance on formal procedures as injustices arising from judgement without due process come to light? Must the legal system necessarily swing between formalism and informalism, between judgement and settlement, as R. Abel (1982) suggests? Would it not be preferrable to concentrate attention on perfecting our understanding of which processes work for which people, and perfecting methods of transferring families from one process to the other?

In support of in-court mediation, the mediators also argued that the in-court process was having a positive effect on solicitor behaviour.[79]

> I think the best thing that has come out of our in-court-conciliation scheme is not what we are doing but what we are presiding over - an attitude of mind. We remind everyone that this is what is expected of solicitors out there and very often they come in and report their progress to the court and you sit there and you have these guys whistling in and out saying, 'We are almost there, almost there,' and you think who is the conciliator here? We are watching them do it and some of them are awfully good. The whole atmosphere is different. So now we are beginning to see them start one stage back. They do it in their first

79 This consequence of in-court mediation was mentioned to me as the reason in-court mediation cases in the courts were becoming more difficult. See Appendix A-1, Services 2 and 4. See also chapter 9. Several of the registrars made similar comments.

> letters and this lowers the temperature no end ... It is not so much our 50 minutes but the attitude which has changed ... The biggest change I've seen is that the conciliation movement has done a lot of that. (in-court conciliator)

This study cannot tell us whether or not lawyers would revert to traditional types of dispute resolution[80] if the judiciary were to discontinue its involvement in mediation. This was one of the mediators' strongest arguments for some type of continuing court participation in the mediation process.

Finally, in-court mediation may offer children better protection than out-of-court mediation. During the course of this study, it became apparent that the out-of-court mediators were not as inclined as the in-court mediators to override parental decisions when the mediators were concerned about the children. In Appendix A-1 we see that all of the mediation services were prepared to breach confidentiality and to terminate mediation when serious allegations of child abuse arose. The in-court mediators, as a group, however, tended to define more broadly the type of child-welfare issue that would cause them to terminate mediation and to seek an investigation than did the out-of-court mediators. The out-of-court mediators were usually prepared to allow parents to make their own decisions, even if the mediators did not agree with those decisions, as long as the implications of the decisions had been thoroughly discussed in the mediation process and as long as there was no actual danger of child abuse. The in-court mediators tended to seek an investigative whenever they did not think the parents' arrangements the best that could be arranged. For example:

> I was dealing with a case where the Father was offering the 14 year old girl to the mother so that she could find council housing - and they were quite happy with it. The girl was close to the other members of the family ... I had obviously see the girl on her own, and ... that wasn't the girl's wish ... [The parents'] solution, which they were both quite happy with, was that he would keep the two younger children and the 14 year old would go to the mother because then she'd have a dependent living with her and could get council housing. What I did was to explain [to the court] what the situation was, where they were on this, and what they wanted. I had obviously seen the girl on her own and I made it clear to

80 For a discussion of the similarities and differences between mediation and the practice of law, see Chapters 9 and 13.

> the court that it wasn't the girl's wish, and because of other factors as well, that I felt it in the child's best interests for her custody to remain in her father so she could be part of the family structure. She [the child] was just being used. I told the parents what I was going to say ... I can't suggest an order to the court which is not appropriate or workable. (in-court conciliator referring to an in-court mediation session) [81]

As we see in Appendix A-1 investigative processes were readily available to the in-court mediators. The mediators could ask the registrar to order a court-welfare report at the end of each in-court mediation session. There is little doubt that an investigation would have been ordered in the following case had the case been mediated in the courts:

> We had a very angry wife who was saying, 'There is no way I will let my husband have the children. I will kill them first!', and she kept on saying it. And we felt - the third time - we looked at one another and said we didn't think we could help her at all ... We said we couldn't be a part of listening to that because it really was dangerous. She was very upset. [*Was this reported?*] No - because the conciliation we do here, the information is confidential and won't go further than the room ... unless they are breaking the law. (out-of-court conciliator)

Does this necessarily mean, however, that mediation ought to be conducted by the courts? Presumably investigation and adjudication, the traditional court processes, would have been more appropriate in the case just recited. Another attempt at mediation during the court process would have only created a further, and possibly dangerous, delay.

As S. Roberts notes,[82] some of the dangers involved in promoting disputant autonomy and decision-making are alleviated if the process is kept separate and apart[83] from the courts. Alternatives to the adversarial process can then be promoted without denying access to the protection offered by the court. If the courts continue to fulfil investigative and judicial roles, mediation services can channel cases inappropriate for mediation to the courts and the adversarial process with the assurance that these cases

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81 Case particulars are not usually quoted exactly as they were given to me to protect disputants' identity.

82. S. Roberts (1986): 25. See also: Report of the Matrimonial Causes Procedural Committee (1985).

83 Keeping the two processes separate and apart does not mean that the courts should not encourage the use of mediation and other alternative dispute resolution services, only that those services should be kept separate from court and judicial processes.

will be investigated and decided on the basis of a thorough examination of the evidence. Disputants who are not well versed in negotiation or who feel they had been pressured into an unwise agreement can then apply to the courts for relief. If the object of the adversarial system is to protect the weaker members of society, then it must be cause for concern when the courts abandon protective processes in favour of a process which may, in some cases, favour the stronger over the weaker members of society.[84] An effective mediation service needs to be backed by vibrant investigative and judicial processes.

What, then, of the advantages of in-court mediation: the availability of legal information; the exposure of greater numbers of disputants to the mediation process; the encouragement of lawyers to engage in settlement activities; and court control over the timing and pace of mediation? Could these benefits not be achieved without incurring the dangers of making mediation part of the court process? The disputants could be given access to legal information in the mediation process if lawyers were included in the process (See Service 1 at Acton and Service 11, Appendix A-1) or if all mediators had legal training. Members of the judiciary could continue to encourage the use of mediation and the courts could continue to be involved in exposing disputants to the concept of mediation, without the necessity of court involvement in the mediation process. (For an example of this type of process, see Appendix A-1, Service 5, the Croyden County Court pre-mediation process.)

Are The In-Court Mediators Different From Out-of-Court Mediators?

Greater London's in-court mediation processes were designed to patch legal disputes, not to resolve conflicts. As we have seen, the in-court processes were, on occasion, coercive and even unpleasant for many of the family members involved. These were also the conclusions of the *Newcastle Report*. For these reasons the *Newcastle Report*

84 R. Abel (1982): 9; J. Auerbach (1983); M. Lazerson (1982): 122; S. E. Merry (1989): 84-5.

recommends that mediation be provided independently of the court, and not by court-welfare officers. Is the latter conclusion justified? Were the members of the court-welfare service poor mediators or were they simply working within the confines of self-defeating processes? When we look at the in-court mediation processes in which the in-court mediators worked (in Appendix A-1) we find inadequate time, impossible scheduling, inappropriate facilities, and, in some cases, judicial coercion. Service 2 mediators were working in the worst conditions. These officers were being asked to mediate 6 or 7 cases in the space of 3 to 5 hours, a Herculean task.

We have seen that the in-court mediators' orientations to mediation were being affected by the court-welfare officers' professional duties to protect the welfare of children in court proceedings. We have also seen that court-welfare officers had been given little opportunity to learn conflict-resolution skills to replace court-welfare methods. We have also discussed the importance of the court's role in child protection. If the same court-welfare officers mediated in their own offices, away from court pressures, secure in the knowledge that the courts would investigate and judge cases not amenable to mediation, would the officers continue to use the children, pressure, and coercion of in-court mediation processes to achieve settlements?

Although this study cannot fully answer these questions, we do see the beginnings of change in the settlement activities of court-welfare officers and the courts in Appendix A-1. We find the courts scheduling fewer in-court mediation cases and spacing them further apart. We also find court-welfare officers and the mediating registrars beginning to exert less settlement pressure upon the disputants and beginning to encourage disputants to engage in fuller, less pressured mediation away from the court environment. (See in particular, Services 1 (Uxbridge), 3, 4, and 16.) When we examine the mediation services that the in-court mediators claimed to be offering to disputants away from the courts, we find that the processes being described were not very different from the mediation services of the out-of-court mediators. For example:

> You are encouraged, if you want to, to adjourn it. It is called adjourned in-court conciliation. - If you think there is any virtue of seeing the children in your office instead of again in the court, something like that. There is no pressure, in both courts, no pressure on us from the courts to resolve it that day. If you go back to registrar .. and say, 'I want another week, because I want to see the children in my office, he'll say 'fine'. They both emphasize that: if the system needs a little more time to be effective, that is what it is all about. (in-court conciliator)

> In court mediation is not my idea of the best way to do conciliation, because I think there is pressure and I like working with a co-worker and I like having people inside and outside at various stages. It is very different. If I need another session, I ask for it to be adjourned. [*Do you get that?*] Yes, what I would normally do then is to have a colleague join me and see the family for several hours and do it properly - what I call properly. I have the whole family in to explain the process and thén we see each parent separately. We see the children separately or together - and I normally allow the family to make that decision. It is their session and I actually say, 'How do you want me to do this, separately or together?'. So everyone is agreed about how we are going to do it. (in-court conciliator speaking of adjourned in-court conciliation)

The officers reported abandoning much of the time and settlement pressure of the in-court process when working off court premises.

Throughout the interviews, despite their lack of formal education in mediation, the in-court mediators exhibited an understanding of the parameters of the mediation process and the drawbacks of the in-court mediation. For example:

> The biggest difference between the two, obviously time and also you are dealing with a case out-of-court [there is] more dealing the hurt and anger than in in-court. [And] giving the parties more time to express themselves and to ventilate and I guess also the confines of the court. In-court has some authority. I am much more directive in in-court conciliation than I would be in out-of-court conciliation. [It is a] question of focus. (in-court conciliator)

We shall be discussing the mediators' views about the goals of mediation and the role of the mediator in chapter 4, but it is important to note here that the in-court mediators did not appear to be approaching mediation very differently from out-of-court mediators. Compare, for example the following comments by in-court mediators about the goals of mediation:

> I regard conciliation, pure conciliation, as not about deciding what is best for the children on my part at all. I see it as a process of negotiation between the parents which I am facilitating;

> The primary goal, from my point of view, is to enable parents to reach agreement concerning their children rather than that process being taken away from them and put in the hands of court-welfare officers or the courts;
>
> [My goal is] to help them to be joint parents of the children. And - these are the only parents these children are going to have for the future - for the children's future to have two parents even though they are not living together, and I believe in that: I like to see parents in charge of the children, not the courts, or social workers or other people. It is a way of saying, 'Do it yourself';

to those of out-of-court conciliators on the same topic:

> Mediation, at its simplest level seemed to be a good way of working out arrangements with the parties that were their [own] arrangements. That is the essence of it: that the choices and decisions are made by the people concerned rather than being imposed by a third party and that is the value underlying the mediation process, and I think that is its very value. It is a very simple notion: instead of someone making decisions about when access is to take place, you make your own decisions.
>
> Our goal is to narrow the area of dispute with a view to getting the parties to see what is the best way of obtaining what they can do for the children's long term interests - to developing a parenting plan.
>
> To help two people who have responsibilities and don't appear to want to get rid of those responsibilities, to find their own way of carrying out those responsibilities as parents in cooperation with the other parent ... It helps two, who were once one in a partnership, to carry out their parenting.

The in-court mediators used the same or similar methods as the out-of-court mediators. For particulars, see Appendix A-1, particularly services 1, 3, and 4. Both the in-court and the out-of-court mediators were trying to help the disputing parents resolve or manage their own conflicts over their children. Both were trying to help the parents decide how to apportion their continuing parental responsibilities after separation. The differences between the in-court and the out-of-court mediators were differences of degree, not of kind.

While it is to be expected that, without additional mediation training, court-welfare officers' duties to children in the courts, will continue to affect the degree of disputant autonomy offered in the mediation process, the phenomenon is not unique to members of this discipline. Other professionals involved in mediation - for example

social workers, psychologists, family therapists - also have professional responsibilities to children. In fact many of the Professional Codes of Practice for Mediators impose a duty on mediators to act in the best interests of children.[85] Why then, should court-welfare officers be singled out for exclusion?

During the course of this study the court-welfare officer mediators exhibited a great deal of knowledge of family law conflicts. This should not be surprising. In chapter 2 we saw that, although the in-court mediators did not have as much formal mediation training as the out-of-court mediators, they did have more mediation experience. We should also remember that the in-court mediators worked in the courts. They had more exposure than most other mediators to the workings of the legal system in family law matters.[86] In chapter 2 we learned that few of Greater London's mediators had formal legal training. It is likely that the court-welfare officers' working exposure to family law in the courts balanced their lack of formal education in this area. A survey of Greater London's family lawyers revealed that lawyers consider court-welfare officers to be the most competent of all professional groups to mediate legal disputes over children.[87] The lawyers were less sure of the competence of social workers, psychologists, marriage guidance counsellors, and even lawyers. They appeared to favour court-welfare officer mediators because of their practical legal, as well as their social-work expertise. Family lawyers are experienced family law dispute-resolvers and their opinions ought not to be discounted lightly. The justifications for excluding court-welfare officers from family mediation appear to be procedural, to stem

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85 Many ethical guidelines for mediators in North America create an obligation on mediators to have the parents consider the interests of children and allow or require mediators to withdraw wherever children's interests are being adversely affected. See, for example,: American Bar Association (Fall 1984): 363, sections III(C)(D), and V; and The Association Of Family And Conciliation Courts, 'Model Standards', as quoted by T. Bishop, (1984); Family Mediation Canada's Code of Professional Conduct article 8(2). The National Family Conciliation Council's Code of Practice For Family Conciliation Services (1986), paragraph 5, is not as flexible. It provides that a mediator *may* terminate mediation if it appears that the parents are acting in a manner "seriously detrimental to the welfare of their children".

86 See Appendix A-1.

87 See: L. Neilson (1990).

from defects in the processes they were using rather than from professional shortcomings. It is important that we separate procedural problems from determinations about who will provide and control family mediation. In chapter 9 we shall find that there are few valid justifications for limiting family mediation to any particular professional or occupational group.

Different Approaches to Mediation: The Conflict Resolver And The Therapist

An examination of Greater London mediation services in Appendix A-1 tells us that the most important differences among mediation services had nothing to do with the judiciary or the courts. The most substantial differences among the services concerned the inclusion or lack of inclusion of family therapy. We shall now compare some of the goals and methods that the mediators working in therapeutic services said they were using with those of the mediators working in conflict-resolution services. (Detailed service descriptions are provided in Appendix A-1.) As we examine the services, we find that the differences between Services 16 and 17 and Services 1 thorough 12, were not merely differences of degree. The processes had little in common. It is clear that the two groups of services were exposing disputants to very different processes. The therapeutic/conflict-resolution balances of Greater London's mediation services were not related to court connections. Several of the therapeutic services had close court connections; the others were independent of the court-welfare service and the judiciary.

Table 3-1 tells us that there were 2 therapeutic mediation services in Greater London, and that another 3 services included aspects of family therapy or were evolving in that direction. The mediators' views on the goals of mediation will be discussed in detail in chapters 4, 5, and 6, but it is important at this point to note some of the differences in the goals and methods used by the two groups of services so that we can understand the types of processes that the mediators were contemplating when they discussed therapeutic methods throughout this study. As we compare the therapeutic to

the conflict-resolution processes, we shall have to consider whether or not the approaches and methods that the mediators described were drawn from conflict-resolution, mediation, or some other occupational or professional endeavor.

Earlier we saw that the in-court and the out-of-court mediators were trying to help disputing parents create their own arrangements for the future care of their own children. The therapeutic mediators, however, also wanted to:

> . . bring about sufficient change [so that the disputants will] be able to negotiate and co-operate with each other and the end result of that might be an agreement but not necessarily. It is much more about the long term health of the family. (therapeutic conciliator)

> [*What do you see as the primary goal of mediation?*] The primary goal is to enable the couple to change sufficiently to wish to reach some agreement, so that they can begin to work co-operatively. I don't think it is reaching a global experience. Obviously we are aiming to reach agreements but partial agreements give them a new experience. Number two it is to change their relationship. If they never come to conciliation they tend to get stuck in a bitter dispute and they never get the chance to relearn the etiquette that may be imperative for their new relationship ... three, as far as I am concerned, is to try to restructure the parenting relationship so that it is workable, so that it does not get detoured through the children. (therapeutic conciliator)

As we look through the descriptions of Services 1 through 12 in Appendix A-1, we find that, in an effort to resolve conflicts, the conflict-resolution services had the disputants discuss their conflicts and the matters which concerned them openly with one another. The mediators used structure, procedural rules, focus, rephrasing, clarification, and repetition of areas of agreement in order to achieve consensus. The mediator or mediators worked directly with the disputants. All communications and information were shared by all participants in the mediation process. The disputants were encouraged to resolve their own conflicts in their own ways.

As we have seen, the therapeutic services had different goals. They wanted to effect changes in relationships and/or family structures. The therapeutic mediators viewed conflicts and disputes as indication of relationship or family problems. Conflicts were not accepted as valid or important in their own right:

> All family therapy tries to understand what it is that is causing the symptomatic behaviour. The family presents a symptom and the therapist tries to understand what is happening to bring that symptom out and then intervenes to try to change things which will enable the symptom to disappear and the symptom in the families that come here is an inability to agree about the arrangements for the children ... So it is our job to try to understand what it is that is preventing them from agreeing and that is very often something about the marital relationship: guilt, not letting go, or what we refer to as the non-emotional divorce: that on an emotional level the marriage has not ended. (therapeutic conciliator)

Consequently the therapeutic mediators used different methods. Instead of mediators working directly and openly with the disputants, hidden viewing teams now advised the mediator:

> We have the screen and the team. The major advantage of that is that the team behind the screen is able to have a view matted to the couple with the conciliator working and so we can see their interaction with the conciliator and we can help if they are sucked into the conflict ... It does give you the space they haven't got. I mean they come in with their psychological space and it is very good to go out behind the screen and talk to whoever is behind the screen ... It really does help the couple for someone to come in and say, 'the team says this'. You can send in a message which is outside the heat of the room. It is really very helpful. It gives another perspective to them.

The purpose of the viewing teams was less to help the family resolve its conflicts than to give the mediator working with the disputants information about the health or structure of the family unit:

> It is virtually impossible alone to remain objective so it is one of the tasks of the team to keep the worker impartial and neutral ... It is very difficult for one person to see the wood for the trees and you get so caught up in the context. It is impossible for one person to both follow what is being said on the context and observe the process - observe the dynamics ... [The team adds] from an objective point of view what is gong on with the dynamics of the family that might be preventing them from reaching a decision.

Instead of encouraging the disputants to communicate and negotiate with each other about the dispute or conflict, and instead of encouraging the disputants to come up with their own solutions, the expert mediator/therapist attempts to give the family a hypothesis of what is wrong with the family unit or the interpersonal relationships within it:

> Now we tend to work with one member seeing the couple and they take

> what we call time out which is about one-half way through the session. We excuse ourselves from the couple and them prepare a hypothesis about what we think is the difficulty. So we use a lot of family therapy skills ... (conciliator)

Finally, instead of open, complete discussion of the disputes and conflicts that the family has asked the mediator to help it resolve, we now have mediators intervening to effect change in the family covertly or secretly:[88]

> The other thing about the method is that ... we quite often give people an intervention at a covert level, almost a subconscious message to take away with them ... We tend to introduce change more covertly so they see themselves doing it: more in spite of us than because of us. (court-welfare officer)

> For instance [an example of the tasks we might set] [we might say:] "We would like you to meet to talk about what you are going to tell the little girl about her parentage when she is sixteen ... if you decide she isn't going to see her dad again" ... which is a covert message. We don't want to know the results of that discussion but we want them to start thinking about the realities of what you say to a sixteen year old girl who has not seen her dad for fourteen years. And sometimes we get crazier ... for instance we had one couple where punishment was a very big theme ... It was clear that neither felt the other had been punished sufficiently and they were obviously using the kids to punish each other. [so we said]: "It is not good to use the kids. We wonder what other weapons you can use. How much more punishment do you think he needs? When will he have served his sentence?" So we devised for them a water pistol fight in the park so they could have their fight without using the kids. Their task was to go to Woolworth's and to buy their water pistols and to have a duel in the park . . . [*Did it help?*] I can't remember. I think they started to see the ridiculous side of it. (court-welfare officer)

The therapeutic and the conflict-resolution services differed greatly one from the other. Their goals, the methods they used, and the processes they provided all differed. Presumably the knowledge that a mediator would need to provide these services would also be different. We can expect, therefore, that mediators who advocate therapeutic services will have markedly different views of the education and training of mediators from mediators advocating conflict-resolution services. We shall discuss the mediators' attitudes towards therapy and the implications of family therapy for mediation in chapter 6.

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88 Covert intervention was a theoretical component of Service 16, not of Service 17.

Summary and Discussion

We have now encountered the effects of inadequate mediator training: a variety of services with little or nothing in common; mediators using methods derived from their other professional endeavors. As we have seen, some of Greater London's mediation services were attempting to patch legal disputes, others to resolve conflicts, still others to heal relationships or to restructure families. When mediation services operated in the courts, the process tended to be pressure-laden, directive and paternalistic. The courts offered disputants court officials who would negotiate on behalf of the children. The time and settlement pressures of the in-court process, and court duties to protect the welfare of children, encouraged the use of children's comments to pressure disputing parents into adopting particular courses of action. Sometimes the process resembled judgement without due process. The independent mediation services encouraged disputant autonomy and decision-making. The therapeutic 'mediation' services were more concerned about the resolution of relationship and family problems than they were about the resolution of disputes and conflicts. Consequently, as we have seen, their methods and processes differed greatly from those of the other services.

The practising mediators' opinions about the parameters and the validity of these divisions in mediation are discussed subsequent chapters. It is important at this point to understand the types of processes the practitioners will be discussing throughout this study, particularly the differences between the in-court and the out-of-court mediation services and between the therapeutic and dispute or conflict resolution services. It is important also to note that the majority of Greater London's mediators (55.9%) had acquired their mediation experience in those out-of-court mediation services that attempted to resolve conflicts by encouraging disputant autonomy. The remaining 44.1% worked in therapeutic or mixed therapeutic/conflict resolution (20.6%) or in mediation services operating in the courts (23.5%). Almost one-half of the in-court mediators had out-of-court mediation experience, but only a handful of the other

mediators had worked in more than one type of service. We shall need to keep in mind the experiences of the practitioners as we examine their opinions about the parameters of the mediation process and the education and training needed to perform it.

Most of the English studies of mediation services have been critical of the in-court mediation process.[89] G. Davis and K. Bader have concluded that: "In the absence of anything more constructive, conciliation in the court premises becomes synonymous with delay. As non lawyers we are struck by this reluctance to allow cases to proceed to trial."[90] G. Davis (1983b) cautions that divorce law was being circumvented by a process which looked like denial of legal rights. Although we did find elements of change, our examination of Greater London's in-court mediation processes in large part corroborates these findings.

The problem was not, however, that the courts were not acting fairly or properly. On the contrary, as we have seen, given the types of disputes litigated in the courts, and given the duties of the judicial system and court officers to protect the interests of children, in most of the in-court mediation cases the court officials were acting judicially. Failure to exert pressure or coercion would usually have resulted in an inferior order. The problem is that child protection and judicial processes are not compatible with disputant decision-making and mediation. During the course of this study it became clear that justice demands that the courts protect the interests of children, investigate, and adjudicate. Both court processes and mediation ought to be encouraged, but as separate and distinct alternatives. The processes do not address the needs of the same people nor do they address the same problems.

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89. G. Davis and K. Bader (1983b): 355; (1983c); (1983d); (1985a,b); G. Davis, A. MacLeod and M. Murch (1982) p.40. See also a letter to the editor of the New Law Journal (Nov. 25, 1983): 1046 in which a law firm said that all of their clients (8 at that time) had failed to reach agreement during in-court mediation. The lawyers said their clients had also reported 'arm twisting'. While this is hardly a representative sample of cases, it does indicate that some participants were having problems with the in-court process. See also: Report of the Interdisciplinary Committee on Conciliation (1983); and the Newcastle Report (1989).

90 (1985a): 45.

This might lead one to conclude that mediation services should be totally independent of the courts. We have seen, however, that there are advantages to some court involvement, perhaps not in the mediation process, but in exposing disputants to the concept of mediation. There is another reason mediation should, perhaps, be under the jurisdiction or control of the courts and the justice system. In 1986 and 1987 the English courts were encountering great difficulty obtaining from court-welfare officers the type of investigation and mediation services that the courts wanted.[91] Part of the problem appeared to stem from the fact that the Courts and Probation Services were the responsibility of two different government departments (the Lord Chancellor's Department and the Home Office). Consequently English courts had little direct control over their own support services. We see the results in Appendix A-1. If mediation services are all to operate independently from the courts, the result may the proliferation of 'mediation' services having little in common with one another. As we have seen, the therapeutic mediation services in Greater London bore little resemblance to other mediation services. These differences were more pronounced than the differences between the in-court dispute-resolution and the out-of-court conflict-resolution services. What will happen to standardization if there are no connections between mediation and the courts? Will an even greater variety of services proliferate? Will the courts not be reluctant to make use of support services over which they have no control? Is it appropriate for the courts to be referring disputants to therapy? The mediation practitioners ponder some of these questions and issues in the forthcoming chapters.

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91 See, for example: Clarkson v Winkley as reported in (1987) Justice of the Peace 151(33):526; Merriman v Hardy as reported in (1987) Justice of the Peace 151(33): 526; Re H. (Conciliation: Welfare Reports) [1986] 1 FLR 476; Scott v Scott [1986] 2 FLR 320.

CHAPTER 4

Mediation: Its Goals and Objectives

Introduction

In chapter 3 we looked at the types of family mediation services operating in Greater London in 1987 and 1988 and found a division in emphasis among them. Some services promoted disputant autonomy and concentrated on dispute or conflict resolution. Others concentrated on protecting the interests of children, and still others on family therapy. We shall find these divisions reflected also in the theoretical views and perspectives of the individual mediators. It is evident that the education mediators need will change with the depth of problems addressed,[1] with the types of substantive issues dealt with; and with the professional backgrounds of the mediators. Someone who is treating family dysfunction needs to have different knowledge from a person who is facilitating a negotiation process. Similarly a person who renders judgements will need different knowledge and skills from a person who guides negotiation, and a person who mediates disputes concerning children will need different knowledge from a person who mediates only financial and property matters. Because education and training needs are dependent on the service one is seeking to provide, an examination of the meaning of mediation is in order. If we are to isolate the educational needs of mediators, we must first decide what mediation is and what it seeks to accomplish. An examination of the meaning of mediation is important for an additional reason. In chapter 2 we saw that

1 E. Koopman (1984) :2

most of Greater London's mediators had social work or mental health backgrounds.[2] It was important to have the practitioners isolate the goals of mediation and the mediator's role within the process in order to be able separate educational proposals connected to mediation, from those based solely on professional or occupational self interest.

As we examine the practitioners' understandings of mediation in this chapter, we shall find that the majority of the practitioners held views of mediation that were in accordance with the bulk of the family mediation literature. Most identified mediation as a dispute or conflict resolution process. In spite of the fact that most of the mediators had mental-health or counselling backgrounds, only a minority mentioned the importance of mental and family health goals. Within the dispute or conflict resolution process the mediators sought to improve communication, to promote disputant autonomy, and to protect the interests of children. As we examine the mediators' comments in this section, we shall find that these goals were interdependent. In particular we shall find that the goal of promoting disputant autonomy appeared to influence the meanings that the mediators assigned to the other goals. This chapter makes clear the mistake of having mediators merely identify mediation's goals and attributes. In order to gain a true understanding of mediators' perspectives, it is necessary also to have them define those attributes and their relationships to one another.

Here we shall focus on the majority views of Greater London's mediation practitioners. In chapter 3 we saw that a minority of the mediators were practising mediation in ways that had little in common with the practices of the majority. In particular we noted differing degrees of emphasis on dispute autonomy, child protection, and family therapy. As we can find these same divisions throughout the mediation literature, they warrant further examination. Thus in chapters 5, and 6 that

2 With the exception of those court-welfare officers who were trained by the Home Office, and with the exception of a probation elective, most court-welfare officers receive the same basic education and training as social-workers.

follow, we shall expand our discussion of the goals of mediation to examine the meaning of disputant autonomy and its connections to the theoretical divisions among Greater London's mediators most likely to effect how they would view mediator education and training. We shall examine the practitioners' opinions about the relative importances of disputant autonomy, expert advice, and child protection in chapter 5; and the practitioners' opinions about the use of procedural power and family therapy in chapter 6. We shall complete our discussion of the parameters of the mediation process with a discussion of financial and property mediation in chapter 7. We turn first to a discussion of the views of the majority about mediation's goals.

Goals of Mediation: The Views of the Practitioners

Many authors have noted a lack of common philosophy and methodology in the divorce and family mediation discipline.[3] Certainly Greater London's mediation practitioners reflected some of this diversity but there was an unexpected degree of mediator consensus among the majority of the practitioners about the goals, limitations and boundaries of the mediation process.

The University of Newcastle Upon Tyne Conciliation Project Unit (Newcastle Report) explored, with mediators throughout England and Wales, the goals of mediation by means of a questionnaire survey. That study found that mediators identified improving communication, reducing bitterness and tension, producing agreements, promoting the best interests of children, and dealing with relationships and feelings as the major goals of the process.[4] When Greater London's mediators were asked to identify the goals of mediation in an open-ended interview survey, without any offer of suggestions, the goals mentioned most often were: improving communication (73);

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3 F. Bienenfeld (1983): 7; B. Cantwell (1986): 278; G. Davis and K. Bader (1985a): 42; R. Dingwall (1986a): 1; L. Kiely and D. Crary (1986): 37; E. Koopman (1984): 2; L. Parkinson (1986a): 49; J. Pearson, M. Ring and A. Milne (1983): 18; S. Roberts (1983): 537; J. Ryan (1987b): 281; J. Walker (1989): 30; N. Wilkins (1984): 122.

4 Newcastle Report (1989): 105, 318-321.

seeking parental consensus/agreement (59);[5] promoting disputant (as opposed to expert or court) decision-making (58); providing a forum or structure within which disputants could communicate/negotiate (42); promoting the best interests of children (38); and providing a process which limited rather than escalated conflict and tension (23). When Greater London's mediators spoke of limiting conflict and tension, they were speaking of process, not of psychological assistance. Other goals mentioned fairly often were: ensuring that disputants were allowed a full airing of their dispute (16); providing disputants with mediator neutrality (14); helping disputants change their relationships with each other from that of partners/spouses to solely that of parents (11); and helping disputants rebuild their self-confidence (11). Only two mentioned reduction of bitterness.

We see immediately that, in an open-ended interview, Greater London's mediators identified some of the same goals as mediators who responded to the Newcastle Report survey: producing improvements in disputant communication;[6] obtaining parental consensus/agreement; and promoting the best interests of children.

5 'Consensus' and 'agreement' are not necessarily the same thing. Agreements reached under pressure may not reflect true consensus. Many of Greater London's mediators were careful to point out their goal was consensus, not just agreements:

> A good conciliator does not let them reach an agreement unless they have actually reached it. (in-court conciliator)
>
> It is important to have each party state at the end of the session, even if everyone seems to have understood and to be contented, and even at the risk of raising new hurdles, what they understand the agreement to be. . . It is important to clarify the agreement and the details of implementing that. . because sometimes agreements can break down because of disagreement over detail ... Because they are so happy at having arrived at a solution, they may not have looked at times, for example.(out-of-court conciliator)
>
> I wouldn't want in-court [conciliation] to be done in a way that people are under pressure to reach agreement and there is that danger: to save money or ... in order to give the impression that the process is working. A lot of pressure can be put on people to reach agreements that are not genuine agreements. (out-of-court conciliator commenting on the in-court conciliation process)

6 See also: P. Phear and M. Shaw (1989): 47.

Their comments differ dramatically from those in the Newcastle Report, however, with respect to 'reduction of bitterness and tension', and 'dealing with relationships and feelings'. Only two of Greater London's practitioners mentioned reduction of bitterness when asked the primary goals of mediation in an unstructured interview, and only 23 practitioners in total mentioned anything associated with counselling, therapy, or healing of relationships and feelings, as follows: providing counselling or therapy (8); helping the adult disputants change their relationship from one of spousal partnership to one based solely on parenting (11); rebuilding the self-confidence of the disputants (11); helping the disputants accept the ending of the marriage (3); helping disputants overcome bitterness (2); and helping the disputants to survive as single people (1).[7] Greater London's mediators did not identify 'reduction of bitterness or tension' or 'dealing with relationships and feelings' as important goals of mediation, but spoke of conflict reduction or resolution instead:

> It [mediation] is about facilitating a reasonable agreement between the two parties with the interests of children in mind and to minimize stress on the children. Once a decision to separate has been made, to facilitate the process with as much ease as possible. (out-of-court conciliator) [8]
>
> [The goal of mediation is] to take away the areas of aggravation so the children are not used as pawns. (administrator of an out-of-court conciliation service)
>
> Whatever happens between the couple is going to affect the children ... so [one of the goals of mediation is] to reduce conflict between the parents and to help them hopefully reach agreement about the children. (out-of-court conciliator)

Greater London's family lawyers shared Greater London's mediators views of the mediation process. Only 9 (8.6%) said they referred clients to mediation for emotional

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7 Mediators often gave answers which fit into several categories. The total number of practitioners picking any one of the emotion/relationship categories was 23.

8 I have used the term 'conciliator' wherever the person quoted usually limited his or her practice to child issues and the term 'mediator' wherever the speaker also regularly offered assistance with property and financial matters.

assistance.[9] The majority expected mediators to help their clients resolve or manage legal and practical disputes and conflicts.[10]

The views of Greater London's mediators and family lawyers are in accordance with the bulk of the mediation literature. As R. E. Walton (1969) states, conflict reduction is a common theme in all dispute resolution forums.[11] England's National Family Conciliation Council's (NFCC) *Code of Practice* (1986)[12] specifies conflict reduction to be the primary goal of mediation.[13] It is not surprising, therefore, to find Greater London's mediators isolating conflict reduction or resolution as one of the primary goals of the mediation process. Reduction of conflict should not be confused with reduction of bitterness and tension. If one were seeking to reduce bitterness and tension one would be looking to the past: to an exploration of 'spousal' and family relationships and the personal and emotional problems stemming from those relationships; one would be seeking to promote the healing of scars produced by events past. If one were seeking to reduce conflict one would be working with the existing situation and looking to the creation of proposals for use in the future.

Perhaps there is an explanation for the difference between this study and the Newcastle Report. Perhaps mediators responding to the Newcastle survey were not offered 'reduction of conflict' as a choice. If so, perhaps the mediators choose 'reduction of bitterness and tension' because it was the given alternative closest in meaning. We find support for this explanation within the Newcastle Report. On page 105 of the Report we find that the mediators gave low priority to counselling and to dealing with personal feelings, yet on page 319 we find that an unspecified number gave

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9 L. Neilson (1990): 241-4. One hundred and fifty-two family lawyers responded to the survey. Of these, 94 indicated that they had referred clients to mediation in the previous year and specified (in response to an open-ended question) the purposes of those referrals. Another 11 indicated an interest in referring clients to mediation, and specified the circumstances in which they would do so.

10 Ibid.

11 p. 89, 95.

12 p. 1.

13 See also: T. Fisher (1990c): 221.

high priority to what appear to be the same or similar goals. The Report itself states, at page 103, that the responses were contradictory. We might also note here that the Newcastle study did not find mediation particularly effective in reducing 'bitterness and tension'.[14] Perhaps this was because 'conflict management and resolution', not the healing of emotional problems, are the goals of the process. If one were to reinterpret the mediators' endorsement of 'reduction of bitterness and tension' in the Newcastle Report as 'conflict reduction', the anomaly within the Report, and between the Report and this study disappears.

In addition to conflict reduction, Greater London's mediators emphasized the importances of disputant autonomy and providing a structure and forum for discussions/negotiations. These goals were not addressed in the Newcastle Report, but they are in accordance with the views of mediators elsewhere.[15] Again, it is not surprising that the majority of Greater London's mediators spontaneously and independently identified disputant autonomy as one of the most important attributes of the mediation process. After all, it is disputant control and decision-making that distinguish mediation from the other types of dispute resolution processes, for example from adjudication, arbitration, and negotiation by lawyers.[16] We shall find that the issue of disputant autonomy and control will be central to our discussions throughout this study. Not only did the mediators identify it as one of the most important goals of mediation, it also influenced the meanings they gave to the other goals, and defined in large part the type of mediator education and training that the mediators advocated.

Are the mediators' correct in their insistence on the importance of disputant decision-making and autonomy in mediation? Certainly this aspect of the process is emphasized in the mediation literature. If disputant control over decision-making is not

14 pp: 268-269.

15 A. E. Cauble, R. Appleford, N. Thoennes, and J. Pearson (1985): 29; Department of Justice, (Canada) (1988b): 153; A. Milne (1984): 54.

16 The similarities and differences between mediation and legal negotiations are discussed in chapters 9 and 13.

a component of mediation, it makes it difficult to argue that mediation offers anything new to the resolution of family law problems other than a change in the professionals who decide these matters, as R. Abel (1982); A. Bottomley (1984); G. Davis (1983)(1988); M. Freeman (1981); L. Girdner (1987); R. Mnookin (1984); and E. Szwed (1984), and others, have warned. Without disputant decision-making power the process becomes arbitration or adjudication, without the legal process's procedural and evidentiary safeguards.[17] Before we transfer family law decision-making from the legal process and the courts to those with mental health backgrounds or to mediators, we would need to consider the impact this would have on family privacy and autonomy.[18] As we shall see in chapter 6, mental and family health practitioners must delve deeply into the inner psychological, interpersonal, and systemic workings of families to effect change. Is it necessary or advisable to subject the mainstream of the divorcing public to this kind of scrutiny? We would also need to question the abilities of mental health and non-mental health mediators to make any better judgements than judges about the best interests of children, given the limitations in the substantive knowledge of the behavioral sciences.[19] Finally, we would need to consider the implications of removing the procedural protections and safeguards offered in the legal process.[20] Several of Greater London's mediators spoke of their concerns about this issue, for example:

> Without lawyers, judges and the courts, mediation looses its validity ... If there isn't that freedom to choose between the two processes you become

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17 For examples of mediation models which promote binding arbitration by mental health professionals or mediators should the disputants fail to reach an agreement, see, for example: M. Cleveland and K. Irvin (1982): 105; Cornblatt (1984-1985): 101-102; J. Greenstone (1978): 7; H. Irving and B. Schlesinger (1978): 71; L. Silberman (1982-1983): 134-135; Wolff: 215.

18 See also: L Friedman (1983): 35; Teeside Polytechnic, comment of G. Davis (1985): 152; A. Sutton (1981)(1983).

19 R. Dingwall and J. Eekelaar (1986): 66-69; H. Foster (1978): 55-58, S. Maidment (1984): 77, R. Mnookin (1975): 264, R. Mnookin and E. Szwed (1983): 10-11, A. Sutton (1981): 45, (1983): 153-154, E. Szwed (1984): 277. In addition, we must think about the effectiveness of therapeutic methods. For the most part, there is little research support for their claims. For further discussion, see chapter 6.

20 S. Cretney (1986): 202-203; H. Erlanger, E. Chambliss and M. Melli (1987): 529-603; O. Fiss (1984): 1075-1086, R. Ingleby (1988): 51-54, S. Roberts (1987): 132-133; E. Szwed (1984): 276; J. Roehl and R. Cook (1989): 44.

> as arbitrary as sometimes the legal process can be. (out-of-court conciliator)
>
> The danger is, and this has been shown in social work, if you reduce the importance of things like the rules of evidence, you are diminishing the role of law which is the help line of any democratic society: the right of access to the courts. If you say that courts aren't appropriate, ... if you take it away you may find what you are left with is inadequate ... [It is] the business of how power should be exercised and I am against any star chamber. In conciliation you could have a power imbalance and they must have the right to go to a solicitor and say, "I am being diddled because I am not a good negotiator". She must have recourse to the courts. (out-of-court mediator)

The prospect of denying family law disputants access to the courts and giving professionals (from any profession) the power to decide family law issues in processes lacking procedural safeguards and rights of appeal, should concern us all. If mediation is truly a voluntary process, firmly rooted in disputant control and not affecting one's rights to have access to legal processes, as Greater London's mediators insist, these problems will not arise.

Once we accept the centrality of disputant autonomy to mediation, however, we are still confronted by mediation research literature which shows that, to varying degrees, mediators do in fact pressure clients to enter the mediation process and do use tactics to produce or even shape agreements.[21] At first glance this appears to be a

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21 a) G. Davis and K. Bader (1983c): 403; R. Dingwall (1988): 150ff; J. Folger and S. Bernard (1985): 5; L. Girdner (1987): 3; D. Greatbach and R. Dingwall (1990): 53-64; Newcastle Report (1989): 285-298; J. Pearson and N. Thoennes (1988a): 75; K. Slaikeu, R. Culler, J. Pearson and N. Thoennes (1985): 63; R. Stuart and B. Jacobson (1986-1987): 76; L. Vanderkooi and J. Pearson (1983): 565.

b) Greater London's mediators justified this use of pressure on disputants to engage in mediation on the basis that mediation helped disputants avoid the horrors of lawyers, judges, and the adversarial process. The mediators (50) criticized the legal system most often for it's tendency to polarize positions, and to increase conflict levels:

> People feel alienated and they get caught up in a process which practically excludes them from the decision making process and although people may feel a sense of relief initially that someone is taking charge of their problem; in the long run I don't think they welcome it. People need to take charge of their own decisions and ... the legal process doesn't encourage that. (out-of-court conciliator)
>
> The other thing that is awful about the adversarial approach, as far as the children are concerned, is that one has got to prove that the mother is unfit, inadequate and is a rotten mother in order to get custody; whereas

contradiction. It becomes less so when we consider S. Robert's reminder that the mere presence of a third party takes a certain amount of power away from the disputants and alters the balance of power among them.[22] Even if you encourage two disputants to sit in the same room to talk to one another, you are exercising a form of power and exerting a form of pressure. All mediator action might, therefore, be placed on a continuum, from behaviour which encourages disputant decision-making to behaviour approaching mediator control over the substantive decisions to be made.[23] In addition to remembering that there are differing degrees and types of mediator control, it is important also to consider the possible influences of mediator education. In chapter 2 we saw that a substantial number of Greater London's mediators had little formal education and training in mediation techniques. We also saw that this appears to be true of mediators elsewhere. Perhaps mediators who have had little educational exposure to mediation tend to assume power over disputants and to exert settlement pressure in an effort to gain agreements, precisely because they lack other skills.

In addition to considering degrees and types of power or control, and the effects of mediator education, we must also consider the influences of mediation's other goals. While it appears that Greater London's practitioners had achieved a fair degree of consensus about what they hoped to accomplish in mediation, potential conflicts among the goals are readily apparent. For example, the best interests of children do not

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> in mediation we work from the point of view that both the parents have something to offer. We are not trying to make out Dad is a blaggard, but rather lets look at what he has to offer, which is very different from the adversarial approach. (in-court conciliator)

22 S. Roberts (1983): 458.

23 L. Girdner (1988): 6, 220, 221-227; C. Greenhouse (1985): 90; P. H. Gulliver (1979) 12-32, 213; S. Roberts (1983): 548-550; M. Shapiro (1981): 3; have suggested that in practice forms of mediation will occur along a continuum from processes which are essentially assisted bilateral negotiation and which leave control over the dispute squarely in the hands of the disputants, to processes approaching arbitration or adjudication. For discussion of specific ways mediators exercise substantive power and for proposed classifications of mediator power, see: J. Bercovitch (1984); S. Bernard, J. Folger, H. Weingarten and Z. Zumeta (1984): 61-71; W. Donohue and D. Weider-Hatfield: 301-315; The Newcastle Report: 322-27; K. Slaikeu, J. Pearson, J. Luckett, F. Myers (1985): 49-50. See also chapter 5.

always coincide with the best interests of their parents,[24] potentially causing a conflict between the goals 'promoting the best interests of children' and 'promoting disputant autonomy'. During the course of the interviews, Greater London's mediators commonly gave examples of these types of conflicts:

> The situation which springs to mind is a situation in conciliation where the parents agreed to split the child during the week: spending 3 days with mom and 4 with dad. OK, some may be able to cope, but this little boy was living his whole life pleasing his parents and that became clear. (in-court-conciliator)[25]

> I had a case. It had more to do with property . . than it was about the best interests of the child. It was: "Ok I will allow you to have custody as long as you take out a mortgage and pay me half". (out-of-court mediator)

> Most people want to be good parents but in this case she admitted she didn't want the children because [she was frightened] if she had enough space to have them [that] he would try to move back in. (out-of-court mediator) [26]

A mediator who places primary emphasis on the goal of protecting the best interests of children will view his or her role in these situations rather differently from one who places primary emphasis on the goal of promoting the right of disputants to make their own decisions concerning their own children.[27] Thus it is important to look, not only the goals of mediation, but also at the interplay between the goals and the emphasis mediators assigned to them. How do we reconcile the fact that Greater London's mediators endorsed both the importance of 'disputant autonomy' and 'promotion of the best interests of children'? Are these goals not in conflict?[28] If we

24 See also: S. Cretney (1986): 203; C. Clulow and C. Vincent (1987): 54; R. Dingwall and J. Eekelaar (1988): 179; H, Erlanger, E. Chambliss and M. Melli, (1987): 597; M. D. A. Freeman (1983): 197; E. R. Hulbert (1987); A. Mitchell, (1985): 86; R. Mnookin, (1984); 368; S. Murgatroyd, (1985): 27-29; O. Stone, (1978): 229; G. Paquin, (1987-1988): 300; Y. Walczak, (1986):3; J. Wallerstein and J. Kelly, (1980).

25 Quotations containing discussion of cases are not accurate with respect to particulars of the disputants or the specifics of arrangements reached. This is because mediators often changed particulars to protect disputant identity and I have sometimes changed those specifics further for the same reason. I have taken this approach throughout this paper.

26 See also chapter 2.

27 We shall examine these differences of emphasis in chapter 5.

28 I am ignoring, for the moment, the family systems' perspective. Those who hold a family systems perspective would argue that the children should be included in the term 'disputants' and given a role in the decision making process. They would also argue that the mediator represents the interests of all

look at the mediators who endorsed these goals, we find that the majority (27/38, 71.1%) of those who spoke of the importance of promoting the best interests of children in mediation, also stressed the importance of disputant autonomy. We must ask, therefore if the goals are truly inconsistent, or if 'disputant autonomy' and 'promoting the best interests of children' somehow temper and define one other. As we discuss the various theoretical points of views of the practitioners with respect to the relative importances of disputant autonomy, child advocacy, and professional expertise in chapter 5, we shall find that it is only when a mediator steps outside a facilitative role and assumes the role of advocate or expert that child protection and disputant autonomy necessarily come into conflict. Most of the mediators who endorsed the importance of child protection were not suggesting that mediators become advocates for children. Instead, the majority wanted mediators to promote the best interests of children in ways that promoted rather than hindered disputant autonomy in the decision making process. Only a few mediators advocated placing a primary emphasis on the interests of children at the expense of disputant autonomy.

Given the practitioners' emphasis on disputant autonomy, it might appear surprising that only fourteen of the mediators specifically mentioned the importance of mediator neutrality. This lack of emphasis is also, however, consistent with the mediation literature. While some authors have emphasized mediator neutrality,[29] others have questioned both its feasibility and advisability.[30] The latter group of authors argue that mediators must step outside neutrality when faced with disparities in power among

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family members equally and that, therefore, the interests of children and 'the disputants' will not be in conflict. We must not forget, however, that sometimes the interests of individual members of the family and the interests of other family members or the interests of the family as a whole will be in conflict. In practice these can not always be reconciled: J. Wallerstein and J. Kelly (1980); E. M. Hetherington (1980): 12. (Family Systems theory and the theory's importance for mediation are discussed in more detail in chapter 11.)

29 W. Maggiolo (1985); Report of the Matrimonial Causes Committee (1985): 20; S. Roberts (1986): 37.

30 S. Bernard, J. Folger, et. al. (1984): 61; G. Davis, (1983): 136, (1988): 70; J. Haynes, (1981): 76; P. Hopkins (1982): 63; H. Irving and M. Benjamin, (1987): 82; K. Kressel, (1985): 96-7, 213; R. E. Walton (1969).

the disputants, disputants who fail to consider the best interests of their children, and disputants who develop agreements that are clearly unfair to one of the disputants or to a child. Many authors have, therefore, abandoned the concept of neutrality in favour of 'professional objectivity'.[31] When neutrality is mentioned it usually means lack of favoritism, a reticence to impose one's own solutions on the disputants, rather than blanket neutrality throughout the process.[32] In keeping with this perception, while many of Greater London's mediators did not emphasize neutrality, when they discussed the personal traits needed by the mediator[33] they emphasized the importance of: professional objectivity; tolerance and the acceptance of the views of others; impartiality or the ability to look at a situation from the point of view of all disputants; the lack of any tendency to be judgmental; the lack of personal involvement; the lack of any need to push one's own views or to be authoritarian, directive, dogmatic, moralistic. These traits combine professional objectivity, respect for disputant autonomy and decision making, and professional responsibility. Again, the goals or traits appear to be connected.

As it is important to look at the attributes of mediation mediators isolate in conjunction with the other attributes they isolate, so also is it important to explore fully practitioners' meanings. By themselves, the attributes do not tell us very much. Let us consider, for example, 'improving communication', the goal mentioned by more mediators than any other. What does improving communication mean? When mediators say they seek to improve communication in mediation, are they saying they want to improve the family's communication during the mediation process, or indefinitely? Are they seeking to improve the amount of communication, or are they also seeking to change its fundamental nature? Does communication include only what one says and the way one says it, or does it also include relationships between people and the

31 This concept will be explored in greater depth in chapter 8.

32 See also: C. Harrington and S. Merry (1988): 725.

33 The personal characteristics needed by the mediator are discussed in chapter 8.

underlying causes of communication problems? A person trying to change the nature of a family's communication patterns on a long term basis obviously will need very different skills and will be using different methods from a person who is trying to get family members to communicate effectively and clearly with one another during a dispute-resolution process.

The mediation literature does not resolve this issue. Many authors suggest that the mediator's role is to help disputants overcome communication problems arising during the mediation process when those problems appear to be inhibiting resolution.[34] These authors argue that, while the disputants may later adopt the use of communication methods they learned and found helpful in mediation, it is outside the scope of the mediation process for the mediator to seek therapeutic or long-term change in the nature of the disputing family's communications. Other authors appear to suggest longer-term, therapeutic change.[35]

Given the state of the mediation literature, there was more consensus among Greater London's mediators about the scope of 'improvement in communication' than anticipated. Seventy-eight of Greater London's mediation practitioners attempted to define the parameters of this goal during the course of their interviews. Occasionally the mediators clarified this goal when asked about the goals of mediation. More commonly the mediators clarified the boundaries of this concept, when asked: '*Does the mediator need to know how to correct dysfunctional communication?*'. The words 'correct' and 'dysfunction' were used intentionally to provoke comments about the scope of 'improving communication'. They had the desired effect. In responding to this question many of the mediators criticized the use of the words 'correct' and 'dysfunction' because they said the words implied the use of therapy, or mediator rather

34 See, for example: L. Hack 21; J. Haynes (Role 1980) 9; K. Kressel, F. De Freitas, S, Forlenza, C. Wilcox, (1989) 66-67; B. Landau, M. Bartoletti, R. Mesbur, (1987) 53-76; C. Moore (1986) 144, 169; A. Milne (1985a) 10.

35 Inter alia: L. Parkinson (1985b) 250; D. Pruitt (1981) 206-7; A. Salius and S. Maruzo: 176; J. Walker (1988).

than disputant control. Of the 78 mediators who attempted a definition, 53 (67.9%) spoke of the limited, short-term nature of the mediator's role. They had this to say:

> My usual answer to that; once you get into that you are going into therapy again so it depends on whether or not this is a deep seated problem which you have encountered. To [be able to] evaluate it: yes; but not to slide into another role altogether. Your attempts to correct are very limited. (out-of-court conciliator)

> That is not your role but if the whole session is hung up on it and you can see a way it can be helped, but it is a fine line. (out-of-court conciliator)

> I suppose so. I am thinking of it in the sense of someone who dysfunctions themselves by always saying what they don't want rather than what they do want ... You can only work with it in the room. If you can see someone is going to sabotage something you can come to it [deal with it] without thinking this is functional or dysfunctional for any reason ... [My problem is that] it smacks of trying to make this family more functional or less functional which is not what you are there to do. (out-of-court conciliator)

> *[The following is an interview with two practitioners. A change in speaker is identified by a change in letter]* A: [an ability to be able to correct communication is] Helpful, because we are not likely to be involved in on going therapy. B: Just by correcting communication, you are correcting dysfunction but in a very limited way. You can perhaps change a few things but you are not going to solve them; [you correct communication but] just to the extent they can begin to talk more effectively. A: This ties in with ethics. If people are coming to you for conciliation, you should not extend your brief beyond that. B: I meant only in the sense that if you are going to be successful, you need to correct some superficial dysfunction: in that way. A: It is part and parcel of the process, rather than a goal. (two in-court conciliators)

These mediators were seeking to improve communication within the parameters of the dispute-resolution process. While they might hope that disputants would take away with them positive communication patterns learned in the process, they did not seek long-term therapeutic change as one of their goals:

> What worries me is how people use these things. I mean I think I know exactly how to use them and others may not. There is the arrogance of being trained social workers and often it is not terribly relevant ... The family is as they are. If they [the members of the family] are interested in changing how the family works then they can go to a family therapist or something like that. (out-of-court conciliator)

The comments of 11 (14.1%) mediators could not be classified on a therapeutic or dispute/conflict resolution basis. The remaining 14 (17.9%) appeared to support a longer term, more therapeutic goal, at least in some circumstances:

> *[Does the mediator need to know how to correct dysfunctional communication?]*
>
> Yes, because we are in a position where we can suggest to them how to modify it because everything is changing anyway. It is a good opportunity, yes. (out-of-court conciliator)
>
> You can improve communication and in my experience this has been quite an important factor on a long term basis. . . If at the end of the day the parties are helped to resolve their differences in a way that is going to help the child, it is going to be the best solution, one which is ongoing. (in-court conciliator)
>
> *[The following was taken from an interview with two conciliators. A change in speaker is identified by a change in letter.]* A: Well, I'm not sure you can. B: You can point it out to them. They might want you to go on. You many choose to refer, but to let them know you know what is going on. A: But we can't go around correcting all dysfunctional families. B: But we can try. I'm quite willing to. You may not be able to break it but I can't see any harm in trying if you spot it ... If they are saying it is dysfunctional and they want you to help, then I would try to tackle it ... then I think you have the right to engage in that. (two out-of-court conciliators)

If in fact most mediators seek only to improve the quality of communication in the dispute/conflict resolution process, and not to change its fundamental nature, this might help to explain the low level and short-term nature of the improvements in communication following mediation found in the *Newcastle Report*.[36] Perhaps long-term improvement in the quality of family communication is not an appropriate measure of mediation's success. It is relatively easy to think of some families who might better be served by limiting contact and communication. As one of the out-of-court mediators commented:

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36 Newcastle Report (1989): 230-240; 268-269. See also J. Kelly (1990); K. Kressel, (1985): 194; (1987): 220. Improving the quality of communication within the conciliation process has been associated with mediator success: J. Pearson and N. Thoennes (1988): 435. Increasing the amount of communication, however, appears to have little effect: S. Rogers and C. Francy (1988): 39. When we look at this type of research it is important that we keep in mind the chicken and the egg syndrome: were certain mediations successful because those mediators were able to improve the quality of the communication between the disputants or because those particular disputants were able to communicate better?

> Who says these people ever have necessarily to meet? Yes, it would be nice if they could meet and smile and talk but since they are not and are extremely bitter, then surely it would be better if the children don't see that. Maybe they never talk again ... Children should move from one to the other with as little stress as possible.[37]

If areas of conflict are resolved or at least reduced, communication may no longer be a problem for the family in any event. Perhaps also, as Greater London's practitioners suggest, other processes are more effective if one is seeking long term, therapeutic change.

Our examination of how Greater London's mediators were defining their roles with respect to creating improvements in the disputants' communication illustrates the importance of exploring fully mediators' meanings. We might have interpreted 'improving communication' in a variety of ways, depending on our disciplinary predisposition. Had we not explored the mediators' meanings, we might have formed erroneous conclusions about the practitioners' understandings of the mediation process, and thus the skills needed to provide it. We now know that the majority of the mediators were speaking of improving communication in a conflict-resolution rather than a therapeutic context.

These were the views of the majority. The minority, however, appeared to have therapeutic goals in mind. These differences of opinion are indicative of one of the major theoretical divisions among Greater London's practitioners. When we examine this theoretical division in chapter 6, we shall find that the division, while marked and important, was one of emphasis or degree. Few mediators could be classified as having purely therapeutic approaches to mediation. Similarly, few ignored the emotional and relational components of conflict and concentrated solely on dispute resolution. Most occupied a place on a continuum between these two extremes. We shall also find that the differences of opinion among the mediators about the inclusion of therapy in

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37 See also: J. Burgoyne, R. Ormrod, and M. Richards, (1987): 81; M. Murch (1980) 90-91.

mediation were, in large part, determined by their views of the relative importances of disputant and expert autonomy and control.

Discussion and Conclusions

Earlier in this chapter we suggested the possibility that the mediation practitioners might make educational proposals based on professional self-interest. The majority did not follow that pattern here. In spite of the fact that most of the practitioners had mental-health and counselling backgrounds, they did not identify mediation to be a mental-health or counselling process. Instead, in accordance with most of the mediation literature, they correctly identified mediation as a conflict-resolution process. We shall find that, for the most part, the mediators will continue this trend throughout this study. Most of the education and training they will propose for beginning mediators will be rooted in the goals and attributes of mediation that they have identified here. These were: reducing conflicts and resolving disputes; improving the ways disputants communicate when they try to resolve their conflicts; promoting and protecting disputant autonomy and decision making; providing a structure and forum for discussions and negotiations; promoting the interests of children without taking decision-making power away from families; and limiting conflict and tension.

From the mediators' comments we can conclude that the majority did not think it part of mediation to change or cure people, their relationships, or their families. Instead, they thought mediators promote consensus and reduce conflicts or the opportunities for conflict. Greater London's family lawyers shared with the mediators similar views of the process.

We can draw several other conclusions from this chapter. The first is that it is important to explore nuances with mediators. We know that mediators hail from a variety of disciplines.[38] The same terms can mean different things to members of

38 See chapter 2.

different disciplines, even to members of the same discipline if educated in different schools of thought. Thus, it is necessary to have mediators define the terms they use, if we are to interpret them correctly. In addition, this chapter makes clear the fallacy of examining the attributes of mediation in isolation. The practitioners' comments made it clear that some of the attributes they were identifying, particularly 'promotion of disputant autonomy', influenced the meanings they were assigning to some of the other goals. The failure to consider mediators' meanings may have produced the contradictions within the Newcastle Report and between the Newcastle Report and this study. In particular, it now appears that Newcastle Report's findings that mediators assign high priority to 'dealing with relationships and feelings' and 'reducing bitterness and tension' in mediation may be erroneous. In an open-ended interview Greater London's mediators emphasized conflict reduction or resolution instead.

This does not mean, however, that none of Greater London's mediators sought therapeutic change in mediation. As we examined the mediators' understandings of 'improving communication' in this chapter, we found that a substantial minority suggested therapeutic goals. This theoretical division also appears in the mediation literature.[39] The shades of practitioner opinion about the place of therapy in mediation will be examined when we look at the use of procedural power by mediators in chapter 6.

Central to all differences in emphasis among the mediators, whether one is examining differences of mediator opinion about dispute or conflict resolution forums, the relative importances of child protection and disputant autonomy, or the place of therapy in mediation, is the issue of power. While we have isolated the importance of disputant autonomy and decision-making power in this chapter, we have not yet examined the meaning of that goal for the practitioners. If we are to isolate mediation and the skills needed to carry it out, it appears essential that we do so now. In

39 See chapter 6.

particular, we need to think about the effects of disputant autonomy on the role of the mediator. If disputant autonomy is an important attribute of mediation, how do mediators reconcile this with expert advise and information giving? With the protection of children? How do they think it affects the mediator's role with respect to procedural power, and the use of therapy? We shall examine these questions in chapters 5 and 6.

CHAPTER 5

Substantive Power And The Mediator: Mediator Perspectives on Disputant Autonomy, Expert Responsibility, and Child Advocacy

Introduction

In chapter 4 the mediators identified disputant autonomy as one of the most important attributes of the mediation process. We saw that it was not only identified as one of mediation's most important attributes, but also that it appeared to influence the meaning that the practitioners assigned to mediation's other goals. We also noted, however, some potential conflicts between disputant autonomy and some of the other attributes of mediation that the practitioners identified. Here we shall carry that discussion a step further. We shall examine the meaning of disputant autonomy for the practitioners and the ways that mediators said they balanced disputant autonomy with their responsibilities to their professions and to children. Although the mediators' comments will not allow us to reach definitive conclusions about the degree to which mediators should intervene in disputant decision-making, our examination of the relationships between disputant autonomy, expert responsibility, and child protection will help us better to appreciate the mediators' understandings of the mediation process.

A discussion of mediator and disputant power can be approached in a variety of ways. One can look at the forms of mediation and compare the types of power exercisable by the mediator within the boundaries of each process. For example, one might compare a process in which the mediator has no power to resolve the disputants' conflict to one in which he or she can make recommendations or decide the matter if

the disputants fail to agree.[1] Or one can compare mediation with other dispute

1 a) For example, see: P. Carnevale, D. Conlon et. al. (1989): 359-360; H. Irving and M. Benjamin (1988): 44; D. Pruitt, N. McGillicuddy, G. Welton and W. Fry, (1989): 368; B. Sheppard, K. Blumenfeld-Jones, and J. Roth (1989): 177.

b) As a proper exploration of this issue is outside the scope of this study, I will only mention here Greater London's mediator's views on this issue. Generally the mediators were opposed to mediators changing roles and subsequently writing reports or making recommendations to the court: 14% were in favour, 23% ambivalent (in favour in some circumstances, not in others), and 63% opposed. (Total expressing an opinion: 100). This appears to be a strong endorsement of the current policy in most of Greater London courts. (Clarkson v Winkley (headnote) (1987) as reported in Justice of the Peace 151(33): 526; Re H (Conciliation: Welfare Reports) [1986] 1 FLR 476; Merriman v Hardy (headnote) (1987) as reported in Justice of the Peace 151(33): 526; Scott v Scott [1986] 2 FLR 320; Practice Direction (Family Division: Conciliation Procedure) [1982] WLR 1420; Practice Direction, Children: Inquiry and Report by a Welfare Officer [1986] 2 FLR 171.) I should point out, however, that more practitioners supported the combination of roles than practiced it (see Appendix A-1). Only 8 worked in this way yet 37 favoured the process in some circumstances.

Those who favoured the combination argued:

> Privilege means nothing to our conciliation clients in a conciliation setting and if the officer has established communication with them in the stress of the court setting and they have responded well and they've gone over bits and pieces for an hour, to loose all that and give it to another welfare officer is confusing to the client: they don't know where they are; you have to start from scratch and then all the knowledge of the first court welfare officer is lost if he is not allowed to pass it on. (in-court conciliator)
>
> The interesting thing is that I don't think parents can quite fathom why if they talk to you for so long, they have to go and see someone else ... It doesn't make sense to people. People don't say anything in conciliation they wouldn't otherwise say ... I don't see any problems. In fact it is a problem for parents if they have engaged and talked at length they find it impossible to grasp why they have to start all over again. (in-court conciliator)
>
> The biggest dilemma for me is when you talk to the kids and you know they will have to do it all over again and if there is anything that puts pressure on you to push the parents - which we have said shouldn't happen in theory - it is the fact that this little sod is going to have to go through this all over again and that - in other words if I pushed just that little bit more, will I be able to prevent Johnny form having to go see another court-welfare officer and go through it again. The most emotive thing is in terms of the kids when you are talking about divorce and for me it is the kids.
>
> *[All three quotes are from court-welfare officers. The last quote is from an officer who supported the division of roles for other reasons but was concerned about the effect on the children. I thought it one of the best arguments so the quote was included here.]*

Those who thought the same person should not move from conciliation to writing a report for the court argued as follows:

resolution processes such as unassisted bilateral negotiation, bipartisan negotiation, arbitration, and adjudication.[2] Or one can explore the effectiveness of the use of mediator power on a situational or contingent basis.

It appears, from the research of Carnevale, Lim and McLaughlin,[3] that

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> I agree entirely with the Practice Directions because I think the idea that they are free to negotiate, to throw out ideas. . in the knowledge that if it doesn't work that it must not be used against them later on, is important. (in-court mediator)
>
> As matters stand I don't think you can. There are those who try but I don't think you can. At it's simplest it is based on a kind of deceit ... You say to them, "This is informal, off the record. We are here for a chat.", and then if it doesn't work out you put on another hat and say, "Well now I'm a court-welfare officer and anything you say can be taken down and used in evidence ... There is no way you can discount what somebody has said informally to you when you start doing the court report. (in-court mediator)
>
> If you are going to get good value out of conciliation, people have to be free to show you the bad side as well as the good. If you are going to be writing a court-welfare report they will only want to show you the good side. (out-of-court mediator)
>
> No. If I was in conciliation and the mother admitted she had told the children the father was dirt, if I then went on to write the court-welfare report, in which case I can be cross examined, I would find it very difficult in the witness box to say I can't answer that question because that was told in conciliation ... By refusing to answer you are almost admitting something took place. (in-court conciliator)

c) This last officer raises an important issue. If the second officer quoted immediately above, concerning the influence of matters previously discussed informally, is correct, and I have no reason to think otherwise, refusal to allow a disputant to question the officer writing the court welfare report on particulars of the conciliation sessions preceding the report may be tantamount to denial of natural justice. Insistence on disclosure, however, breaches the other's right to confidentiality and privilege. Clearly the courts cannot have the same officer doing conciliation and preparing a court welfare report if confidentiality and privilege are to be offered as part of the conciliation process (unless the courts are also prepared to limit disputants' rights to question officers about the basis of their reports and any recommendations in them). Given the influential nature of these reports, both on court decisions and on the settlement activities of the disputants: (Stephenson v Stephenson [1985] FLR 1140; Cadman v Cadman [1982] 3 FLR 275; Re T (1980) 1 FLR 59; P. Ash and M. Guyer, (1986): 554-561; R. Levy (1985): 496-497; S. Maidment (1976b): 237; M. Murch (1980): 130; N. Stone and L. Shear (1988): 58; one must surely question the advisability of the latter approach.

2 For discussion of the relationship of mediation to these other forms of dispute resolution, see: P. H. Gulliver (1979); S. Roberts (1979); S. Roberts (1983): 537; M. Shapiro (1981). We will be comparing what lawyers do (a form of bipartisan negotiation) to mediation in Chapters 9 and 13.

3 (1989): 213.

mediators need to know when to exercise, and when not to exercise power: what works in one situation will not work in another. In practice the application of power in any given situation will depend not only on the theoretical orientation of the mediator and the form of mediation that he or she practices, but also on the circumstances of the disputants. A proper exploration of any of these aspects of mediator power would require the observation and evaluation of many mediators conducting different types of mediation sessions. Here we are looking at practitioner perspectives, not at process and outcome. In keeping with this approach and our theoretical and educational foci, we shall limit our discussions to the practitioners' views of the parameters of mediator power and disputant autonomy, particularly those aspects of power that we might expect to influence practitioner views about mediator education and training.

We shall divide our discussion into two sections: the influence on disputant autonomy of mediator tactics that pressure or influence disputants to reach a particular conclusion (substantive pressure or power); and the exercise of mediator power through control over the process. We shall discuss substantive power first, leaving discussion of procedural power and the place of therapy in mediation to chapter 6.

We shall further divide our discussion of the appropriateness of mediators using substantive power into two sections: mediator views of the relative importances of professional expertise and disputant autonomy, and mediator views of the relative importances of child protection and disputant autonomy. These were the major theoretical divisions among the practitioners. We shall find that the majority of Greater London's mediators reflected a strong commitment to disputant autonomy, and that this commitment influenced the amount and type of substantive power that the practitioners thought mediators should exercise in the furtherance of professional and child protection goals.

In chapters 2 and 3 we learned that most of the mediation in Greater London in 1987 and 1988 was limited to child issues. We also learned that many of the

mediators were particularly well read in the areas of child development and the psychological effects of divorce and family separation on family members. Consequently it will not be surprising to discover here that many of the mediators' comments about the limits of disputant autonomy will concern child protection.[4] We shall find that the methods used to protect children or to include them in mediation had a great bearing on the ability of disputants to make their own decisions. We shall begin our discussion of the relationship between disputant autonomy and the promotion of the interests of children, therefore, with a look at how Greater London's mediators included children in the mediation process. We shall find that some of the methods used, particularly those commonly used in the courts, had the potential to change the mediator from an unbiased facilitator into a child advocate. We shall also find, however, that this tendency, while apparently more prevalent in in-court mediation, was not exclusive to it. Most mediators, both those working in and those working off court premises, thought mediators should promote the interests of children in ways that did not inhibit disputant decision making. We shall examine some of their suggestions here.

Substantive Power and the Mediator

There is a fair amount of research literature on the use of substantive power in mediation.[5] Generally we find that the research tells us that the use of mediator power

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4 See also: Family Law (1990) 20: 410.

5 a: For some of the authors who discuss types and the ranges of substantive mediator pressure tactics, more fully than I will here see: J. Bercovitch (1984); S. Bernard, J. Folger, H. Weingarten and Z. Zumeta (1984): 61-71; W. Donohue and D. Weider-Hatfield (1988): 301-315; The Newcastle Report (1989): 322-326; K. Slaikeu, J. Pearson, J. Luckett, F. Myers (1985): 49-50.

b: For research comparing the powers parents want mediators to exercise to those mediators propose using, see: A. Elwork and M. Smucker (1988): 21; and for research on the effects of the use of mediator power, see, inter alia: G. Bierbrauer, J. Falke, K. Koch (1978): 40; D. Brookmire and F. Sistrunk (1980): 311; P. Carnevale, D. Colon, K. Hanisch (1989): 344-367; P. Carnevale, R. Lim and M. McLaughlin (1989): 213-240; G. Davis and M. Roberts (1988): 66; W. Donohue, N. Burrell, M. Allen (1989): 37-42; W. Donohue and D. Weider-Hatfield (1988): 297-315; W.. Donohue (1989): 322-343; J. Falke, G. Bierbrauer, K. Koch (1978): 104; J. Hiltrop (1989): 241-262; A. Hochberg (1984); Newcastle Report (1989): 284-298; J. Pearson and N. Thoennes (1988a): 71, (1989): 9-30; D. Pruitt, N. McGillicuddy, G. Welton, W. Fry (1989): 368-393; B. Sheppard, K. Blumenfeld-Jones, J. Roth (1989): 166; K. Slaikeu, R. Culler, J. Pearson (1985): 55; K. Slaikeu, J. Pearson, N. Thoennes (1988): 475-495; L. Vanderkooi, J. Pearson (1983): 557.

is multi-dimensional. Levels of intervention must be considered in conjunction with the characteristics of the disputants to whom it is being applied. The research also tells us that an acceptable or helpful level of mediator intervention with one disputant will not necessarily be acceptable to another. Subject to these conditions, it appears from the research that, within limits, the use of power by the mediator is positively associated with mediator success; particularly when exercised at moderate levels and particularly if one defines success as the production of contractual arrangements. It also appears, however, that some types of mediator power, for example, the power to make recommendations, to arbitrate or judge, may have a negative effect on mediator behaviour because mediators having these powers tend to make less effort to facilitate disputant decision making.[6] The literature also cautions us to remember that disputant agreement and disputant satisfaction are not always the same thing. There are indications in the research that disputant control is positively associated with the disputants' satisfaction with the mediation process.

These results and the mediators' insistence on the importance of disputant autonomy and decision-making appear contradictory. Let us examine the issue further, beginning with a brief look at what we mean by the assumption of substantive power. A mediator exercises power over the disputants' decisions whenever he or she uses tactics calculated to induce disputants to decide to enter the mediation process, to reach agreement, to make concessions, or to reach specific agreements. If we were to move from mediators who are not directive to those who are very directive, we might find mediators repeating areas of mutual agreement; shifting the focus of discussions (i.e. from principles to interests);[7] emphasizing the concessions made by one of the disputants; offering additional options, making proposals and offering research results in

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6 For a discussion of Greater London mediator views on the advisability of combining mediation with investigative processes, see footnote 1 (b and c).

7 Fisher and Ury (1983).

support; or making threats and using pressure tactics.[8] These methods all influence disputants' decision- making processes, but they will all affect the freedom of disputants to make their own decisions differently. Thus, when we speak of the relationship between the substantive power of the mediator and disputant autonomy, we are speaking about degrees of influence and not about absolutes. The research tells us that there may be benefits to mediators assuming *moderate* levels of power.

We know from the mediation literature that most family mediators say they are opposed to mediators making decisions for disputants.[9] In fact we have already identified ultimate disputant decision-making as an essential ingredient of mediation. We have also seen, however, that all mediators exercise power to some degree. In an examination of the opinions of various types of English mediators, international as well as family, J. Bercovitch found that while most mediators did not think it part of their role to tell disputants what decisions to make, they differed in their opinions of the appropriate amounts of power mediators should exercise short of ultimate decision-making.[10] Greater London's family mediators followed the same pattern. We shall find that the differences of opinion among the practitioners were largely dependent on the emphasis they placed on the relative importances of professional expertise and child protection on the one hand, and disputant autonomy on the other. While in practice the mediators' views of these matters were often connected, for theoretical purposes, we shall separate them here.[11] We shall begin our discussions with a look at the mediators' perspectives on the importance of professional expertise.

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8 For further discussion of the range of specific mediator pressure tactics, see the authors cited in footnote 5 (a) above.

9 J. Bercovitch (1984): 48; J. Blades (1984b): 71; A. Cauble, R, Appleford, N. Thoennes and J. Pearson (1985): 29; C. Harrington and S. Merry (1988): 725.

10 J. Bercovitch (1984): 48, 71.

11 Discussions about the influence of professionalism are relevant to financial and property as well as to child-focussed mediation.

The Views of the Practitioners: Balancing Expert and Disputant Power

None of Greater London's mediators (with the exception of a few of Greater London's registrars)[12] thought it appropriate for a mediator to tell disputants what decisions to make. All, however, were prepared to exercise power to a limited degree in some circumstances. When Greater London's mediators disagreed about the acceptable limits of mediator control, it was often because they did not agree on the relative importances of disputant control and professional expertise.[13] Much of the debate revolved around children because most of the mediation in Greater London during 1987 and 1988 concerned disputes over children and because this was the area in which many of the mediators claimed expertise.[14]

It is clear from the comments of the mediators quoted below, that they assigned high priority to disputant autonomy and control, and low priority to expert knowledge:

> Mediation, at its simplest level, seemed to be a good way of working out arrangements with the parties that were their [own] arrangements. That is the essence of it: that the choices and decisions are made by the people concerned rather than being imposed by a third party and that is the value underlying the mediation process and I think that is its very value. It is a simple notion: instead of someone making decisions about when access is to take place, you make your own decisions ... I don't believe in gurus or the notion of experts ... You come up against that time and time again. [Mediation] need[s] skilled people but not the expert or guru. It is about giving power back to them. (out-of-court conciliator)
>
> [The role of the mediator is to provide] a feeling they are going to be listened to and most important of all that they are the ones who have the power; that this is not a place where the specialists sit and give out information ... to give people back the confidence to know that they are actually the ones with the answers. (out-of-court mediator)
>
> [We try to] make the best arrangements for the child and that means what the parents think best, not what we think best. It is difficult because sometimes they [the parents] are making arrangements that you think won't work ... but this whole argument of should we try to impose our views. The most you can do is ask them if they've looked at other options and steer them in that direction but I don't think you can say, "I

12 See Appendix A-1, Services 1 to 4, 15, and 16 and 'In-Court Mediation and the Judiciary'.

13 See also: J. Folger and S. Bernard (1985): 18; R. Strena and G. Westermark (1984): 47.

14 See chapter 2. See also: G. Davis (1988a): 79; G. Davis and M. Roberts (1988); and Family Law (1990) 20: 410.

> don't think that is a very good idea" because you start altering the flavour of mediation which includes a belief that the parents know best. I have had some arguments on this with some of my colleagues who are more of the school of thought that we are the experts. I think the parents know best ... There is always a danger that we will impose our own views and values about child rearing and education forgetting the basic philosophy [of mediation]. (in-court conciliator)

If the role of the mediator is to guide disputants in their deliberations with one another and to encourage consensus between them, as these mediators suggest, one would expect the focus of mediator education and training to be on the process of dispute- or conflict-resolution. If, however, mediators are to give professional advice or fulfil an educative or even quasi-judicial function, as the following mediators suggest, then one would have to put more emphasis on substantive knowledge:

> I violently disagree with this fundamental assumption of conciliation that the parents know what is best for their children. That is generally true but quite often the parents do not know and there is an ethical conflict when you realize what is best for those children. [You have to] take power away from the parents, or at least one parent. That, as far as I am concerned is the backfall. What I do then is concentrate on what is right for the child. (in-court conciliator)

> I would take that [an unfair agreement] [15] head on and I would throw in my 2 bits: my professional opinion because I do think people have professional opinions so I ask them what they think of that; [say] that I feel the implications would be this, that and the other. I bring in the court also: what the court might think of some of these bizarre arrangements and if that didn't work and the parents still wanted to hold, I would report back to the court ... (in-court conciliator)

Finding the right balance between disputant decision-making and expert responsibility was not easy for the mediators:

> It is this difficult balance of where do you play the role of expert and tell people what is right. In mediation it is a real balance. If you say "That is not right, you mustn't do that", then you are not mediating. So I think it is about trying to keep people engaged while you talk about it, then turn it around, try to look at it in different ways; maybe sending them away to get advice and then having them come back. (out-of-court mediator)

> *[This is an interview with 3 out-of-court conciliators. A change in speaker is identified by change in letter.]* A: It is a difficult question because you are talking about the limits of your responsibility in a

15 During the course of the interview practitioners were asked what they would do if the parents reached an agreement which they considered to be unfair. This quotation is a response to that question.

> situation where the couple are reaching an agreement which goes against what you professionally think is in the interests of the children. I think the most you can do is say, "In my professional opinion, I don't think the agreement is in the best interests of the children", but if they insist, I don't think there is anything you can do ... B: It is the parents' decision. I think our involvement should be minimal unless there is a risk of abuse, including emotional ... A: We are actually quite powerful. Yes they do make their own decisions but yes we do have very strong feelings about acceptable parenting. B: We operate on certain principles and I think conciliators should, but there are times when we contravene those principles and we should be aware when we are doing it and why.

We cannot resolve here the correct balance between professional or expert responsibility on the one hand and disputant autonomy on the other. Obviously, within limits, the balance will change in response to the attributes of the disputants and the degree to which they propose straying from what is considered to be the norm. Obviously too, mediator opinion about the correct balance will change with the nature of the subject under consideration. We do know, however, that the majority of Greater London's mediators considered disputant, as opposed to expert or court decision-making, one of the most important attributes of the mediation process. We can surmise from this that most of Greater London's mediators preferred the views of the first quoted group of mediators, those who assigned high priority to disputant decision-making and lower priority to expert knowledge. In chapters 11 and 12 we shall find that, in keeping with the majority view reflected here, most of Greater London's mediators emphasized the importance of procedural rather than substantive knowledge.[16]

If most mediators think it appropriate to give more weight to disputant autonomy than to professional expertise, how do mediators ensure that disputants' decisions are informed ones? What of the research indicating that the mediators who exercise moderate levels of power or control are more successful? For an explanation let us look briefly at the mediation literature and at some of the ways that Greater London mediators said they choose to introduce information to the disputants.

16 Greater London's family lawyers, however, tended to stress the importance of substantive knowledge for mediators: L. Neilson (1990). Was this because they considered expert knowledge more important than dispute control? There were indications that this may have been the case in the lawyers' responses.

When we look at the mediation literature we find that it appears that disputants value gaining a better understanding of their own, their children's, and their spouse's feelings and positions during the mediation process.[17] We are also warned, however, that successful mediators spend little time attributing thoughts or feelings to others, or making and requesting disclosures of feelings.[18] Several of Greater London's mediators expressed their disapproval of mediators attributing thoughts or feelings to disputants, for example:

> [It is] unhelpful when the mediator tends to make interpretive remarks about psychological aspects. I don't think people want that or appreciate it. If the mediator makes comments about the relationship or what went on before: "You have not really given up your wife". I don't think mediators should make any interpretive remarks about relationships. (out-of-court conciliator)

An example of a mediator attributing feelings was given to me by one of Greater London's registrar, as follows:

> There was a little girl of seven living with Mom and spending every second weekend with Dad. [There were] no problems and then one day Mom says no more access. Dad has a new girlfriend who has a boy of nine. She [the mother] made an allegation of sexual interference ... It was quite a screaming match, which is fine. The real problem was not the allegation but the fact that she had not really given up her husband. She was really jealous of the new girlfriend and once [the court welfare officer] got her to admit this, it was the end of the argument. We haven't heard from them since. (registrar) [19]

How do we reconcile disputants' appreciation of gaining a better understanding of their own family's feelings with the negative findings on mediators attributing thoughts and feelings? Are the studies contradictory? Probably not. Perhaps, as A. Elwork and M. Smucker's survey of parents and mediators suggests,[20] consumer satisfaction and mediator success depend upon the methods mediators use to introduce information.

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17 A. Elwork and M. Smucker (1988) 21; J. Hiltrop (1989): 241; J. Pearson and N. Thoennes (1988b): 435, (1989): 24.

18 J. Benoit (1985); J. Pearson and N. Thoennes (1989): 25; K. Slaikeu, R. Culler, J. Pearson, N. Thoennes (1985): 68-70; K. Slaikeu, J. Pearson and N. Thoennes (1988): 492.

19 This registrar approved of the technique. I have changed minor details when case examples are given.

20 (1988): 21.

Perhaps disputants value education or information offered by mediators if it expands their ability to make their own decisions but are critical of education or information that directs or inhibits them.

Perhaps this distinction will become clearer as we look at some of the ways that mediators in Greater London said they gave information to or 'educated' their clients. Education or information given in the following ways might assist the disputants without taking power from them:[21]

> *[What do you see as your role within the process?]* To explain how the procedure works, what the process is, and the parameters we are going to work in .. Then, if necessary, to draw up the threads and feedback [what has been said] if they are inarticulate; to clarify what they are saying. Certainly in no way to direct. To act as a sounding board and also to give any useful information one might have. (out-of-court conciliator)
>
> *[What do you do when the disputants are moving to an agreement which is not fair to one or the other of them?]* I've seen occasionally where they have been moving to [an agreement] which would be totally impractical. Suddenly they get a burst of good will to each other and they start, both start, promising each other the earth. On that occasion I would say, "Look have you thought about what would happen if this happened?" Suddenly they've gone too far and there might well be disappointments because it might be impractical. I do think it is the conciliator's job to just mention, "have you realized the difficulties of so and so", purely the practical difficulties. (out-of-court conciliator)
>
> *[What if there is an imbalance in power between the disputants?]* I think the party's views of power are just as important as the objective issues. It is a very complicated matter. It is very important that the mediator perceive these imbalances, to make them explicit. Everybody has got to know what is there ... The mediator can also ensure that there is no imbalance in their knowledge and if there is, [he or she should] send them off to inform themselves and to gain access to that knowledge. For example, if one party is unrepresented and doesn't know their rights then they should be encouraged to go off and find out what those legal rights are. (out-of-court conciliator)
>
> *[This quotation was taken from a mediator's comments about the need for and limitations on the need for mediators to have substantive knowledge.]* It is important to have all this information about the law, in case you are asked, "what are the alternatives?". So you can say, "the possibilities are

21 The quotations which follow were taken from mediator responses to a variety of open ended questions: what do you see as the role of the mediator within the mediation process; what do you do when it is clear there is a power imbalance between the disputants, and what do you do when the disputants are moving towards an unfair agreement. I have indicated the question asked in square brackets. These questions were not asked to ascertain or predict mediator behaviour but to identify theoretical orientations.

> X, Y, or Z" or "the possible reasons someone might behave in this way are A, B, or C." If [substantive knowledge is] given in response to requests for information, then fine. (in-court conciliator)

If given in another way, however, 'education' can limit a disputant's options and become very directive:

> *[unfair agreement]*[22] I do keep reminding them that they are there for the children and "this doesn't seem to me to be in the children's best interests" and "maybe you should look at it", not from their point of view at all but from the children's point of view. And sometimes I say, "Now I'm going to pretend actually to be the child and I'm not happy with what you've agreed because". I try to put myself in the position of the child and relay to them the child's concerns. (out-of-court conciliator)

> *[unfair agreement]* As far as the finance is concerned ... I will try to point out the advantages and disadvantages ... If I felt the situation was such that although there was no need for me to withdraw, I felt the need to express my own views ... I would them say to the couple that in my own personal view the proposal did not seem to me to be a lasting solution to their problems and that I would put that in our report [to the solicitors] of any agreed terms. [23] (out-of-court mediator)

> *[unfair agreement]* I am not adverse to giving little lectures, saying; "It is very good for children to see their dad, to have a meal with him, to spend the whole day with him, rather than little bits [of time]. It is the quality of your access rather than the quantity which is important. So go away and think about it." (in-court conciliator)

> We actually remind people, whether they like it or not, that the court will provide a certain base line ... The mother may say [the father can have access] every second week for two hours and we can say, "The minimum the court would ever give is one day a month. You've got to do better than that whether you like it or not." (out-of-court conciliator)

Consideration of the relationship between expert and disputant power is complicated by the fact that the same behaviour by the mediator can be expansive at one point in the process but directive at another. For example:

> [A useful technique is] normalizing: saying, "Sometimes one partner wants to end the marriage and the other doesn't and the one who wants to end it often feels very guilty and that feeling of guilt can lead them to giving away something. It can lead people to load themselves with arrangements which are not necessarily the best from the children's point of view". ... "You may wish to make some personal sacrifices because you are so conscious of what you are doing to him but should the children be

22 What do you do when the disputants are moving toward an agreement which is unfair to one or the other of them?

23 This mediator had only recently started to practice. With experience one would hope that an exploratory, less directive approach might be recommended.

> deprived of a standard of living they would normally enjoy? You cannot separate your standard of living from theirs." (out-of-court mediator)

This discussion might expand the abilities of the disputants to arrive at their own decisions if directed to one disputant apart from the other disputant. The comments make apparent an imbalance in the respective negotiation positions of the disputants and encourage the person to whom the comments are directed to look at the full implications of the decision about to be made. The same mediator behaviour in a joint session, however, would be extremely directive, particularly during an examination of various options. Similarly the statement: 'Children have the right to see both parents. Parents do not necessarily have the right to see the children',[24] might help to focus the disputants' discussions if made at the very beginning of the mediation session before any discussion of the particulars of the conflict but would be extremely directive if, for example, made after the father has been informed that the children no longer want to have any contact with him. If mediators are to promote disputant control over decision-making in mediation, it appears that they must choose the methods and timing they use to introduce information to 'educate' disputants with care.

In addition to timing, the mediators' comments also suggest the importance of distinguishing between information and advice. The mediators whose comments suggested that they used methods of educating disputants that expanded rather than inhibited disputant power, were offering information; the directive or inhibiting mediators were offering advice. It might be helpful for a mediator, for example, if qualified to do so, to tell disputants about different types of child arrangements; to tell them of the advantages and disadvantages of various methods of valuing property; to tell them of various financial options available to them, as long as the information is given fully,[25] and in a balanced, neutral manner. It is quite another situation for the mediator to say, 'If your case went to hearing, the court would order x, y, and z', or to say, 'My

24 Out of court conciliator.

25 Clearly the mediator who suggests some options and not others, is acting in a directive manner.

advice to you is to accept that offer'. This type of advice ought only to be given to disputants by their partisan legal advisors.[26] When mediators give advice, they inhibit the disputants' ability to make their own decisions in accordance with their own needs and values; when they give information, they expand it. Advice giving can easily change the balance of power within mediation, turning the mediator into the expert who is directing the disputants to reach a particular conclusion.

Disputant control over decision-making assumes a certain amount of disputant expertise. As mediators move from helping disputants make decisions about the future care of their own children to helping them sort out their future financial and property affairs, the expert versus disputant control balance becomes increasingly problematic. A substantial number of Greater London's mediators were not in favour of financial and property mediation for this reason:[27]

> I think it is better to have your partisan lawyer to deal with property and finance because one of the main reasons why the parties have the authority to make the decisions over the children is that they are the experts, and I don't think they are the experts so far as property is concerned. (out-of-court conciliator)

The mediation literature supports this mediator's statement that disputants do not have expertise in financial and property matters.[28] The goal of having disputants make their own decisions must surely include an assumption that those decisions are informed ones.[29]

Thus, as one moves from mediation of disputes over children to mediation of property and financial disputes, information-giving assumes increasing importance. Those mediating financial and property issues must grapple with educating the disputants as well as with valuation and disclosure problems without the procedural safeguards and checks and balances of the adversarial system. This worried some of

26 J. Ryan (1986): 117-119.

27 For a discussion of the mediators' views on financial and property mediation, see chapter 7.

28 K. Kressel (1985): 40. See also: A, Mitchell (1981): 38.

29 Inter alia: H. Andrup (1983) 43; A. Bottomley (1984): 299; S. Cretney (1986b): 200; R. Ingleby (1988): 51-2; E. Szwed (1984): 276.

Greater London's mediators:

> Finance is different. People are seldom honest. With children we have the advantage of having dealt with thousands of cases and know what happens with this or that resolution. With money we don't know whether they have another job, a building society account somewhere or what their business has made. The more money, the more skillful you need to be. You need to employ accountants to stifle [attempts at deception]. It needs a patient uncovering, ... detective work and an imposed solution. (in-court conciliator)

If there is not full disclosure and if the disputants are not making decisions that are truly informed ones, mediation succumbs to the arguments of its critics that the process will simply result in rule by the more powerful.[30] For example, one family lawyer working in Greater London commented:

> I would not recommend any of my clients to attend conciliation in respect of financial matters because the conciliation services in operation do not include lawyers experienced in family law who can advise as to the fairness of any settlement reached. I find that in practice this leads to disastrous results for women who do not have equal bargaining power and for whom it is often important to make financial arrangements which will be adequate for the rest of their lives. (member of the Solicitors' Family Law Association, Greater London)

If financial and property mediators are to have disputants make informed decisions, yet protect disputant decision-making and autonomy, it appears vital that the practitioners master non-directive methods of giving information.[31] This will be crucial for lawyers-cum-mediators because, as partisan professionals, they are used to giving advice[32]; also because there is research suggesting that lawyers may not fully appreciate the non-directive nature of mediation.[33]

Disputant Autonomy versus the Interests of Children and Child Advocacy: The Views of Practitioners

In addition to differences of opinion about the importance of professional expertise in

30 Inter alia: R. Abel (1982): 9; J. Auerbach (1983): 142-146; A. Bottomley (1984): 299; S. Cretney (1986b): 202-203; H. Erlanger, E. Chambliss and M. Melli (1987): 597, 603; O. Fiss (1984): 1073; L. Riskin (1982): 34-5; S. Roberts (1986): 29.

31 Practitioner opinions about financial and property mediation are discussed in chapter 7.

32 For discussion of the differences between the ways lawyers settle cases and the ways mediators resolve disputes/conflicts, see chapters 9 and 13.

33 L. Neilson (1990).

mediation, the other theoretical division among the mediators that affected their views on the acceptability of mediators assuming control concerned the importance of child protection. In chapter 3 we saw that the in-court mediation services in Greater London and the court-welfare officers who worked in them were more apt than out-of-court mediators to view children as the focus of the mediator's professional responsibility. It is important that we examine this difference of opinion among the practitioners if we are to further our understanding of mediator views of the mediation process and the role of the mediator within it; and if we are to understand mediator perspectives on the education and training of mediators. A child advocate needs different knowledge and skills and will use different methods from someone who is trying help families make their own decisions.

As we examine the mediators' opinions about the proper emphases to be placed on the mediator's responsibility to protect disputant decision-making on the one hand and to protect children on the other, we shall find it important to understand the methods that Greater London's mediators were using to include children in the mediation process. Consequently we shall begin our discussion with a look at the practices of Greater London's mediators with respect to children.

Greater London Mediator Practices With Respect to Children

A substantial minority of Greater London's mediators (45.4%, or 44/97) rarely included children in the mediation process; 13.4% (13/97) did so occasionally or sometimes; 26.8% (26/97) did so often or regularly; and 14.4% (14/97) did so almost always.[34] This diversity in practice with respect to children is not unique to Greater London. The literature indicates that it is common throughout England and North America.[35]

34 Five mediators had not yet established a practice or policy with respect to children.

35 National Family Conciliation Council (1986b); J. Kingsley (1990): 185. It appears that elsewhere children are involved in somewhere between 6.2% and 66% of the mediation cases: Department of Justice (1988c): 104; A. Mitchell and F. Garwood (1989): 284; J. Pearson and N. Thoennes (1988b) 433; Newcastle Report (1989) 272; M. Little, N. Thoennes, J. Pearson and R. Appleford (1985): 1; and that individual mediators have quite different practises: A. E. Cauble, R. Appleford, N. Thoennes and J. Pearson

There was also little consistency in the practices of Greater London's mediators concerning the ages at which children were included.[36] Of the 53 mediators who included children at least occasionally, 15 included children of any age; 9 had established a minimum age of 5, 6, or 7; 18 a minimum age of 8 or 9; 4 a minimum age of 10 or 11; and 2 a minimum of 12 or older. Many of the 44 who included children in mediation only rarely, however, were prepared to include teenage children in some circumstances. The mediators were evenly divided in their opinions about the appropriate ages for inclusion: almost as many (18) thought it appropriate to include children of all ages, as thought it appropriate to limit the participation of children to those twelve years of age or older (20). The minimum ages for inclusion suggested were as follows:[37]

Minimum Age	**Number**	**Percentage**
no minimum age:	18	25.4%
4, 5, 6 or 7:	12	16.9%
8 or 9:	14	19.7%
10 or 11:	7	9.9%
12 or older:	20	28.2%

These figures do not necessarily tell us much about the frequency of practice. For example, the 15 practitioners who included children of all ages might not have included very young children as often as they did older children. The North American researchers have found that mediators are more likely to seek participation of the

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(1985): 30-32; Department of Justice (1988c): 104; J. Pearson, M. Ring and A. Milne (1983): 15.

36 See also: J. Kingsley (1990): 185. For the practises of the mediation services with respect to the inclusion of children, see Appendix A-1.

37 (a) 71 of the practitioners expressed a preference on this issue. Of the 31 who did not comment, 3 had not yet established a policy or practice, and 20 never or rarely included children and were opposed to including them in most circumstances.

(b) For opinions of other mediators on this issue, see: A. E. Cauble, R. Appleford, N. Thoennes and J. Pearson (1985): 32; E. Lyon, N. Thoennes, J. Pearson, R. Appleford, (1985): 18; A. Mitchell and F. Garwood (1989): 284; Paquin, (1987-1988): 73-74.

children as the children get older.[38] This was probably also true of Greater London's mediators but as information was not gathered on this topic, this is an impression only.

There is a great deal of controversy about whether, when, and how to include children in mediation. In the mediation literature, we find, on the one hand, authors who argue that children should always be included in the mediation process. These authors argue that inclusion gives children the opportunity to talk about their feelings, perhaps for the first time.[39] They argue that mediators who include children have higher agreement rates,[40] and the opportunity to gain a fuller understanding of the family's problems.[41] The latter argument is particularly emphasized by those who advocate the use of a family systems approach in mediation.[42] Authors who promote the inclusion of children also argue that it is important to include children because, during periods of crisis, parents are often unable to separate their children's feelings and needs from their own.[43] If children are not included, parents might unintentionally resolve custody and visitation issues without considering the children's true wishes and needs. We know from the research that adolescents expect to be consulted in the planning of visitation.[44]

38 A. E. Cauble, R. Appleford, N. Thoennes and J. Pearson (1985): 32; E. Lyon, N. Thoennes, J. Pearson, R. Appleford, (1985): 18; G. Paquin (1987-1988): 73-74.

39 F. Garwood (1990): 43-52; E. Ronald Hulbert (1987); J. Ross (1986): 83. C. Clulow and C. Vincent (1987) found that the court welfare officers in the unit they studied, preferred to include children for this reason. A. Mitchell (1985): 74 found that children who had been given an opportunity to talk to a social worker or psychologist had found this helpful.

40 H. Irving and M. Benjamin (1987): 234 concluded from a review of the mediation research that mediators are more successful if they include children in the process. I did not notice this trend in the research literature but since I have not compared the reported agreement rates for all mediation services studied by researchers that included children in the process with the reported agreement rates of mediation services that did not include children, I cannot comment on this conclusion. I do know, however, that this was certainly not the case in Greater London. In-court mediators were more apt than out-of-court mediators to include children, yet they have traditionally reported lower agreement rates: see the Newcastle Report, G. Davis (1988b); G. Davis and K. Bader (1983b,c,d) and (1985a,b). See also Appendix A-1.

41 J. Howard and G. Shepherd (1987); H. Irving and M. Benjamin (1987).

42 We shall discuss the views of Greater London mediators on the relevance of family systems theory to mediation in chapters 6 and 12.

43 J. Howard and G. Shepherd (1987); E. R. Hulbert (1987); A. Mitchell (1985); S. Murgatroyd (1985); and J. Wallerstein and J. Kelly (1980).

44 C. Springer and J. Wallerstein (1983): 15; Y. Walczak (1986); J. Wallerstein and J. Kelly (1980).

On the other hand, authors who are opposed to or cautious about the inclusion of children in mediation argue that children should not be burdened with responsibility for decisions of the magnitude of those that have to be made during the separation or divorce process.[45] They argue that inclusion places too much pressure on children; that children are susceptible to parental coercion, coaching, and promises; and that children often are not good judges of their own best interests.[46] Research suggests that children's preferences about custody should only be accepted, if at all, with caution.[47] Children appear to vacillate in their decisions about whom they want to live with within relatively short periods of time.[48] One mediator in Greater London offered an illustration of the danger of relying on children's views, as follows:

> I had a sad case where after a long time we became aware that [one of the parents] was mentally disturbed and sadistic. Because of the confidentiality rulings of the agency, I could only disclose that conciliation had failed and that a court welfare report would be needed. The judge interviewed the children and because of their views granted custody to [the ill parent]. The case is now coming back to court after one child has had several suicide attempts. (in-court conciliator)

Although the research results are mixed, it appears that many parents favour the involvement of their children in the process.[49] It is important to be cautious when accepting these results, however. It is highly probable that parent's and children's views will depend on the methods used to include them and the use to which the children's views are put. This will become clearer as we examine some of the methods that Greater London's mediators used to include children.

Greater London's mediation practitioners were as divided as the authors in the

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45 J. Collinson and K. Gardner (1990): 118-9; G. P. Davidson (1987): 14; R. Emery and J. Jackson (1989): 8; Report of the Matrimonial Causes Committee (1985): 50.

46 C. Clulow and C. Vincent (1987): 161-3; M. D. A. Freeman (1984): 203, 206; Report of the Matrimonial Causes Committee (1985); J. Wallerstein and J. Kelly (1980); R. A. Warshak and J. Santrock (1983): 29.

47 J. Wallerstein and J. Kelly (1980) and footnotes 45 and 46.

48 R. A. Warshak and J. Santrock (1983): 29.

49 See, for example: C. Clulow and C. Vincent (1987): 161-3; G. Davis (1988a): 174; G. Davis and K. Bader (1985a,b); G. Davis and M. Roberts (1988): 96-7; Department of Justice (Canada) (1988b): 215; A. Elwork and M. Smucker (1988): 28; F. Garwood (1990): 43-52; M. Murch, M. Borkowski, et. al. (1987): 92; J. Pearson and N. Thoennes (1984a): 31; D. Saposnek, J. Hamburg, et. al. (1984): 16.

literature about the advisability of including children in mediation. Forty-nine (48.0%) mediators favoured the inclusion of children. Fifty (49.0%) did not think children ought to be included as a normal practice, although most said they were prepared to include children: 1) at the request of both parents and the child or 2) when the children were 12 years old or older, at the end of the sessions, after the parents had reached a degree of consensus, to iron out the details that concerned them.[50] The in-court mediators in Greater London were predominantly in favour of the inclusion of children; the out-of-court mediators tended to be more cautious. As we have seen, however, even the in-court mediators questioned the appropriateness of the in-court mediation environment for children.

Mediators who thought children should be included commonly offered four arguments in support of their views.[51] These were, in order of frequency: first, that access or visitation is the child's right and that therefore the child should have a voice in the decision:

> I feel that children should be seen because you are dealing with their rights. It is their right to see their parent so why shouldn't you ask them how they feel and why they feel it? (registrar);

second, related to the first, that involving the children often allowed the mediator to get around a parent blocking access:

> You are very often stuck when you are seeing only the parents and the mother is saying, "I'm not blocking access ... but if you ask Billy, he won't go." It is a wonderful cop out for her ... What is quite rewarding is when you have the mother saying the children don't want to see the father and then you bring them in and the child jumps on his lap. (in-court conciliator)

> Sometimes she says they won't go with daddy because they are terrified of him and the child says, "Daddy will you take me to the loo?" and sits on daddy's lap, which she is able to see as well. It may be quite hard for her ... (out-of-court conciliator)

These examples, with minor variations, were given by a substantial number of

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50 The other mediators did not express any strong preference.

51 We shall discuss here only the four arguments most commonly presented.

mediators. If parents do ascribe their own hurt and anger to their children these examples should not, perhaps, be surprising. Frustrating though it may have been for the mediators, these women probably truly believed that they were justified in trying to protect their children. Perhaps the inclusion of children in this way helped some parents separate their own from their children's points of view. We should note here that these children were not being placed in a decision-making position and that their views were positive rather than negative. We shall find that the inclusion of children can be tragic when children or their comments are used to oppose a parent or to create a particular settlement, particularly when the children's views are negative. We shall see that, while there is little doubt that children's attendance in mediation produced agreements or 'consent' orders, the consensual nature of these arrangements was sometimes questionable.

The third commonly given reason for including children, particularly older children, in mediation was that the mediators felt that if older children were not consulted, if their interests were not considered, they would sabotage their parent's agreement:

> In general terms I think the older, the more mature the children, the more they should be able to state their views. In purely practical terms it becomes more and more difficult to implement the decisions of the parents unless they are in on that and signify that they are going to co-operate with it. When children are in their teens it is very hard to work it out [without them] because their interests will take precedence over either parent. (out-of-court conciliator)

Many of the mediators, even those who were generally opposed to including children in mediation, agreed that adolescent children, if they wished, should have a voice in working out the final details of arrangements that concerned them.

Finally, the mediators in favour of including children commonly argued that, in spite of the fact that including the children in mediation would expose children to parental squabbling, they had heard it all before:

> Often the parents don't want them there because they don't want them to

> hear them arguing but I say, "They do hear you arguing. It is safer here than at home." It is very easy for some people to forget that when they hear people in our offices and they say how can you expose children to that. (in-court conciliator)

> In the early stages we had a few complaints, mainly from solicitors. They said that it was too stressful [for the children] to come [to court]. But quite frankly the children have been exposed to that stressful situation for the last x number of months so I discount that. (in-court conciliator)

The mediators who were not in favour of children being included in mediation, however, argued that decisions about the future of the family should be the responsibility of the parents, not of the children:

> I feel the more you talk to children about what they want, you raise their hopes or their fears and in the end it may not be in your power or in anyone else's power to give them what they want. I think as parents one of our main obligations and responsibilities is to take on our shoulders responsibility for deciding what is best for the children. It is quite wrong to put onto children the burden of deciding how much time with dad or whether to live with mom. The adults have made a mess of it and have a responsibility to make it easy for them. (in-court conciliator).

These mediators countered the 'children have seen it all before' argument with the argument that, while this may be so in many families, the children had not been faced with the indignity of witnessing their parents fight in public:

> It is difficult to bring them into a situation where they see their parents rowing. I don't mean to say they haven't seen it before but not in front of a couple of conciliators. It is a big embarrassment. (out-of-court conciliator)

> I definitely don't like children being there. Although people say children are there during quarrels, most of those quarrels are not about what happens to the children: education, money for their clothes, but not what is going to happen to their future. I don't think they should be exposed to that. I don't like the power it gives them either. (out-of-court conciliator)

Finally the opposing mediators argued that involving children in the mediation process places inordinate pressure upon them:

> It is very difficult. When you have a couple separated and the children living with one parent and there is an access problem. If you bring them into conciliation you are asking them to betray the person they are living with. I think the child sees it as betrayal ... They have lots of confusion. They have already lost one parent and are being asked to betray the

> person they live with: Why don't they want to see the other parent? Maybe they do desperately ... It is so difficult. Some children are so hurt. (out-of-court conciliator)
>
> I've never included children [in the decision making session with the parents]. I don't think I would. I think it is putting an unnecessary burden on them and I think parents already do that. They do things with the best intentions in the world but the road to hell is paved with good intentions ... They say, "well we don't know, let the child choose." I hit the roof then, and I give them what I really think. I don't see why this child should have to do all the decision making, poor kid, he's already doing enough. I won't have it. (in-court conciliator)

There would appear to be a fair degree of consensus among the mediators about the need to include interested adolescent children in mediation. The real disagreement among the practitioners was with respect to the inclusion of younger children. Some mediators appeared to be quite prepared to let children (or advocates for the children) make the family's decisions about residence, custody, and visitation. Others stressed the importance of sheltering children and preserving parental decision-making. Central to this difference of opinion was the issue of who has power and control in the mediation process.[52] Before we examine the mediators' views on how mediators ought to balance the rights of disputants to make their own decisions, and the protection of the interests and rights of children, let us first examine the methods that Greater London's mediators used to include children.

If children were seen during the course of the mediation sessions, most mediators (52.7%, 39/74) indicated that they usually saw the children separately rather than with their parents for at least part of the process. Another 29 (39.2%) preferred to include them in the sessions with their parents, and another 6 (8.1%) preferred to limit the participation of children to post-agreement meetings with the parents to iron out agreement details.[53] These preferred practices[54] were often blended, however. Many of

52 Because it does not have a bearing on mediator education and training, I am ignoring the effects of another difference of opinion among mediators that obviously also had a bearing on this issue: mediator perspectives on the roles of parents and children in the family, and on the rights of children.

53 For descriptions of these processes, see Appendix A-1.

54 Obviously one cannot necessarily predict practice from mediator preference alone as other factors such as: time pressures, the preferences of the disputants, the preferences of the children, the children's ages, the circumstances of the case; will influence a mediator's behaviour in any given situation.

those who preferred to see the children apart from their parents said that they also later included them with their parents in a joint family session. Furthermore, most of those who usually saw the children in mediation sessions with their parents were also prepared to see the children separately in some circumstances, for example:

> Generally we have the whole family in together and have several sessions like that. Sometimes where inappropriate matters are being discussed we exclude the children. . We don't allow parents to put the decisions on the children. Whether we would see the children separately would depend. If the parents ask us we will discuss it first in a family meeting: why and what we hope to accomplish. If we are concerned about the children's welfare, then we will see them separately, either in our offices or at home and again with the parents' permission. (in-court conciliator) [55]

Sometimes mediation sessions including the children were used to bring the children's concerns into the open:

> The more I speak to children and adults whose parents have divorced, the more I think children need to have some involvement, so that they feel they have been consulted but not in the decision making process. I would like as part of the session for parents to tell their children [about the arrangements being made for them] and to check out with them how they feel about them. (out-of-court conciliator)

> The parents will try to split the child down the middle [by saying]: "choose". I have said to the child, "Do your loyalties feel divided? Do you feel split down the middle?". And the child burst into tears and said, "I don't know what way to turn. If I go one way, I upset Mommy. If I go the other, I upset Daddy." [For] these parents, that [the joint session] was the first time they had heard this. They were shocked at themselves. (out-of-court conciliator)

Occasionally, however, it was clear that the children, or their comments, were used by the mediator to confront the parents, or one of them, or to push for a particular outcome:[56]

> I have included children in the sessions particularly when they are of an older age, if they are over ten, say 11, 12 or 14 and they've made up their minds: they don't want to see one parent, usually the father, and I will ask a child if, rather than having it come from me as a negotiator, how the child would feel saying it to the father with me present. I've done this before because very often a parent will take it better if it comes straight from the child. (in-court conciliator)

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55 This is a quote from an officer who blended mediation and family meetings held during court welfare enquiries.

56 See also: Family Law (1990b): 410.

> It is very difficult when you get children in the session who are very definite that they don't want to see the other parent. Perhaps it is better done in the session because then the person has to face the fact that the children don't want to see, it is usually him. They tend to think it is the mother putting the children against them but then they have their own opportunity to question the children and they will say, "Why don't you want to come and see me?". *[That must be very difficult]* Yes, but it is better there, out in the open, than done secretly. (out-of-court conciliator)

When Greater London's mediators were observed using children or their comments to confront parents, the practice appeared to be extremely powerful in terms of obtaining concessions from one or both of the parents. The consensual nature of these 'agreements' was, however, often highly questionable. In some cases this practice appeared potentially damaging and even dangerous to children, for example:

> I had a case where I was asked to talk to the child privately, to state [in the mediation session] what he wanted. That put the child under enormous pressure. . and he said he didn't want to have anything at all to do with his father and I felt very uneasy. I felt the child was not mature enough to work out all the implications. It was a question of cutting his father out of his life entirely. The father was devastated. I did not think it properly in the interests of the child in the long run. I had questions about the mother's influence on the child. I shall not allow myself to be put in that position again. I felt like telling the father to go to court and fight it out but I couldn't do that ... The father left weeping and it was the end of the session. I left very upset. I don't think any child should be put in that position. (out-of-court mediator)

During one of the observed in-court mediation sessions, the child involved was interviewed apart from her parents for a few minutes.[57] During the course of that interview, the child expressed a desire to have no contact with her mother. After some limited encouragement to change her mind, the mediator invited the child to tell her mother this personally. When the child declined, the conciliator sought and gained the child's permission (by a nod of the head) to do this for her. The mother was then invited into the room and the mediator confronted her with the child's position whereupon the mother had her daughter face her in order to tell her that she was glad because she didn't want to see her or even to hear anything about her for the rest of the child's life. The case was resolved. The mother withdrew her application, but at what

57 I have changed minor details.

cost for the child? Surely we must all question the advisability of placing children such positions.

What happens a month after the mediation appointment when the child no longer feels as hurt and angry, and realizes what he or she has done to the mother or father or to him or herself? Most mediators only see the children once or twice; in-court mediators for only a few minutes; out-of-court mediators perhaps for several hours. Should the child's views be permitted to dominate the process in these circumstances? Some mediators thought not:

> There are cases where it may be very comforting to see the children but it is very difficult if you see the child on only one occasion. For example if the father wants access and the child didn't want to go, I felt actually at the end of the two to three hours we discussed the case it was agreed the child should not be forced to see her father and I felt we should have seen the child over a period of months before we came to such a vital decision ... I was quite upset when they made their decision after having seen the child only once for two hours. (out-of-court mediator)

The time and settlement pressures and the lack of facilities for children in the in-court mediation processes[58] make the implications of this mediator's comments even more poignant. At least out-of-court mediation services did not prevent an aggrieved parent from reconsidering his or her acquiescence to the views of the children and from seeking relief from the courts. (Again we encounter the importance of separating settlement from judicial processes.) When the judicial system is involved in this type of settlement, the pressure on children and their parents becomes overwhelming. One can imagine situations where a parent has to be told that a child does not want to see him or her, but surely this can be accomplished tactfully and without directly involving the child.

As we saw in Appendix A-1 and in chapter 3, children did not have to be in attendance for the mediator's presentation of the children's comments to create settlement pressure on parents. It is very difficult for a mediator, whether working on

58 See Appendix A-1 and chapter 3.

or off court premises, to introduce a child's views or concerns to a mediation session without appearing to condone or even advocate those views. A better solution, if children's negative comments or concerns are to be introduced to the parents for consideration, would be to have a non-mediator fulfill the function. This problem is amplified by in-court mediation processes where, as we saw in Appendix A-1 and in chapter 3, the parents were sometimes confronted with their children's views in front of a registrar, a court-welfare officer and as many as four legal advisors.[59]

We cannot draw any definite conclusions from the mediators' comments about the advisability of including or excluding children from mediation in all circumstances. We can make note, however, of the potential effect that inclusion has on the mediators' assumption of substantive power, and on the disputants' abilities to make their own decisions. We have seen how, in practice, including children or their comments in mediation can expand the disputants' abilities to make their own informed decisions, or can direct their decisions, depending on whether or not the mediator allowed children, or their comments, to be used to determine mediation's outcome. Some mediators stressed the importance of giving children a voice in the mediation process; others stressed the importance of furthering the decision making power and responsibility of the parents. Presumably the mediator who attachs high priority to his or her role in protecting the interests of children will include children rather differently from the mediator who places primary emphasis on a the rights of disputing parents to make their own decisions about their own families. We turn now to an examination of the mediators' theoretical perspectives on the issue.

Practitioners Views of the Mediator's Role: Disputant Autonomy versus the Child Protection

Our examination of Greater London's mediator practices with respect to children gives us an understanding of the types of experiences upon which the practitioners based their

59 See also: G. Davis and K. Bader (1983b): 357.

views of the place of child advocacy in mediation. It is important that we gain an understanding of the mediators' role with respect to the protection of children and disputant decision-making if we are to gain a full understanding of the mediation process and thus the education and training needed to provide the service. Let us turn now to an examination of the different perspectives held by the practitioners.

It was clear that many of Greater London's mediators clearly considered the disputants to be in control of the children and the decision-making process:

> We do see the children if we think it would be helpful, particularly older children where you need to help the child negotiate with the parents if they don't like the arrangements. But it is not up to us to side with the child and say, "We think you should fight Mom and Dad" but "We will help you to talk to them". The belief that Mom and Dad are in charge of the children is, I think, essential. (in-court conciliator)

> Certainly I think the decision making should be taken control of by the parents, however distressed or depressed or confused they may be. I would like . them ... not [to be] looking to their children to take matters out of their hands. They should be able to communicate that belief to the children so that the children don't get an inordinate sense of responsibility from their parents. For that reason I am more comfortable with the children coming to mediation as part of information sharing than I am in terms of the conciliation process: the decision making. I think that is the parents' business. (out-of-court conciliator)

If the mediator believes the disputing parents to be rightfully in control of the dispute-resolution process, then his or her role will be to expand the information upon which the parents base the resolution of their disputes/conflicts. If, however, the mediator sees his or her role as representing or becoming an advocate for the children, as the following mediators suggest:

> [One of my roles in mediation is] to act as a go-between the couple and to help the children if they are of the right age, to express their feelings. . and what they want to do about it; what they want to happen rather than having someone else always act for them; to allow them their say. (out-of-court conciliator);

> Sometimes [my role is] to bring the child's point of view to the fore: when the parents are locked in their own positions vis a vis each other. So in some circumstances, to represent the child to a certain extent. (in-court conciliator);

> [The children are] not really part of conciliation but may be used as part

> . . For example, father may be saying he wants to see them every week and mother and the child can't take it: the child is saying, "But I have cubs, et cetera. Once every three weeks would be fine." And you ask the child, "Have you been able to say this to your parents?" If he says, "yes, but they won't listen," then it is easy to go and say, "so and so has said this, why are you having so much trouble?" Then you can bash quite hard for what the child has said. I have to confess I exert more pressure on the parents; I do pressure parents to get what the children really want, no doubt about it (in-court conciliator);

then his or her role changes from that of an impartial third party assisting families to resolve their own disputes in their own way, to that of a partisan negotiator or arbitrator, sometimes even against one or both of the parents:

> What we inevitably do is to point out the pitfalls. You are redressing the balance again: you are saying I am representing the children and I am putting their point of view. And yet there is a risk that you are undermining their parenting because you are saying, "I know better than you do what your children need." (out-of-court mediator)

> I've said, "I understand you love the children but you can't apportion a child to each of you 50% of the time. It is not in the child's interests." If in conciliation that happened, I would say just that and: "I have to say from the point of view of the child and I will tell the registrar [judge] I think it is not a good idea and see what she has to say". (in-court conciliator)

> I brought them all in and before he could object, the court-welfare officer had already gone out [to interview the children]. The children were old enough to voice their views and those children wanted to see their mother ... The children knew she [the mother] was in prison and they wanted to see her. It required a strong line. If you took the view that you were never going to exercise your authority but simply use your persuasive powers, you wouldn't have got a result without a contest in court and a long delay but what you got was an arrangement which was in the best interests of the children and it was achieved in a month ... If you take the line that conciliation is each [parent] talking, there is no way this man and this woman would have reached an agreement on their own so someone had to persuade them that this was in the interests of the children. (registrar speaking of an in-court conciliation session) [60]

In chapter 3 we saw that the in-court mediators had a greater tendency than the out-of-court mediators to see their professional responsibilities in terms of the children. We also saw that this tendency was no doubt amplified by the fact that these officers

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60 This is an example of how child advocacy can move a mediator, particularly one used to exercising power, into an adjudicative role. We might question the lack of any opportunity to present evidence, or to have a full investigation and hearing in these circumstances.

worked within the confines of court processes. Thus, we might expect child advocacy to be more prevalent in the courts.

What then of the large number of mediators, both those working in and those working away from the courts, who identified both disputant autonomy and the protection of children as a goal of mediation? It became clear, from the mediators' comments, that a mediator who placed primary emphasis on disputant decision-making could promote the best interests of children without taking power away from the disputants. For example:

> Sometimes the parents are genuinely in doubt as to what the children really feel about the situation or they feel the children don't have anyone to express their feelings to, and then we can offer some kind of place where they can talk without any pressure to reveal what was said or we can help the child to find a way to explain to their parents what is distressing them ... [When parents are moving towards an agreement which does not appear to be a good one] we ask [the parents] to imagine how the situation they are proposing will be enacted; to imagine how the child will feel ... I would invite them to rehearse what they are going to do by small changes. We would be exploring the situation with them. (out-of-court conciliator)

> I see my focus as facilitating the couple's own right to make their own decisions and I see it as the mediator's responsibility to ensure that they examine the consequences of those decisions, and therefore I think the children's needs are protected by the parents making wise agreements and by them making the decision in itself. Because if they reach agreements, that is good for the kids because it reduces conflict. The mediator is not there to represent the children's interests but to ensure that the third parties, who are not at the negotiating table but who are affected by the agreement, that their interests are considered by the parties. But I also think the parents are the best judges of what is best for their own children. I don't think that I know best and I think that people going through divorce are not incompetent to make their own decisions. (out-of-court conciliator)

If, however, the mediator, in promoting or protecting the interests of the children, became an advocate for the children, the mediator's assumption of substantive power limited the disputants options and could become extremely directive:

> The only realistic way is to say to the parents: "Look, this is not doing the child any good because this child has other fish to fry. He can't see you on a Sunday morning because he wants to play football with his football team so you are going to have to cut out the access on Sunday morning and maybe only see him Sunday afternoon." (in-court

conciliator)

> [In a situation where the parents wanted to split up the children so the father would have the right to council housing] What I did was to explain [to the court] what the situation was, where they were on this, and what they wanted. I had obviously seen the boy on his own and I made it clear to the court that it wasn't the boy's wish, and because of other factors as well, that I felt it in the child's best interests for his custody to remain in his mother so he could be part of the family structure. He [the child] was just being used. I told the parents what I was going to say. Mom wasn't too worried but Dad wasn't very happy ... but I can't suggest an order to the court which is not appropriate or workable. (in-court conciliator, referring to an in-court conciliation session) [61]

If the role of the mediator is to act as a partisan negotiator representing the interests of children, we would expect him or her to have extensive substantive knowledge about children and the effects of different family structures on the well-being of children. We would also expect him or her to use and therefore need partisan negotiation methods. If, however, the role of the mediator is to assist disputants with their own negotiation processes, we would expect procedural knowledge to take precedence over substantive knowledge. Adversarial negotiation would be replaced by communication strategies to encourage the disputants to co-operate and negotiate with each other.

In chapter 4 we saw that the majority of the mediators who endorsed the protection of children as one of the goals of mediation, also endorsed the importance of disputant autonomy. Here we have seen that the two goals are not necessarily incompatible. Mediators can protect the interests of children and promote disputant decision-making at the same time if they are careful to keep both goals in mind and do not become advocates for the children. This can be accomplished by focusing the disputants' attention on the children and by ensuring that the disputants fully explore child issues:

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61 This example illustrates one of the problems with mediation, particularly if done on court premises where 'agreements' are turned into court orders with no time for reflection. If the courts and the court's officers turn their backs on the children in these circumstances, what recourse will the children have? On the other hand, this clearly does not reflect disputant control. For further discussion of some of the dangers created by attempts to combine mediation and court processes, see chapter 3.

> [Interview with two court-welfare officer conciliators; a change in speaker is identified by a change in letter] A: [I think the goal of mediation is] to help them to be parents of these children. These are the only parents that these children are going to have for the future. ... I believe in that. I like to see the parents in charge of the children, not the court, not social workers or other people. It is a way of saying: "Do it yourself". B: I agree wholeheartedly. It is very much a promotion of parental decision making and the assumption of parental responsibility. (in-court conciliator)

> We will help them look at what would be the role of the absent parent with regard to access and we can direct them in terms of "this is what you should be looking at, but the decision on how you agree on what is available is yours." We can only focus their attention on what is possible. (out-of-court conciliator)

Most of the mediators did not recommend child advocacy, however. Only 16 of the 102 mediators interviewed either advocated or illustrated child advocacy in their answers. Eleven of the 16 were probation or court-welfare officers.[62] The remainder either were firmly committed to the rights of parents to make their own decisions about their own families or saw their own role as giving parents the right to make their own decisions within broad limits. When mediators became concerned about the welfare of children they usually advocated the termination of mediation; if the mediation was occurring in-court they usually requested a court-welfare enquiry.[63] It is evident that most of the practitioners thought it appropriate for mediators temper their roles as protectors of children with their duties to protect disputant decision-making. In chapters 11 to 13 we shall find that this perspective will affect the type of education and training that the practitioners will propose.

Summary and Conclusions

We have now examined the major theoretical divisions among Greater London's

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62 Although the majority of the child advocates were court-welfare or probation officers, only a minority of the officers in total were child advocates. We will remember from chapter 2 that 49 of Greater London's mediators were either court-welfare or probation officers. Forty-five participated in this study. Thus 24.4% of the officers in the study reflected a tendency towards child advocacy.

63 Almost without exception Greater London's mediators considered mediation to be inappropriate in cases involving child abuse. Only three said they would continue to mediate in these circumstances if adequate protections for the children could be devised. For a description of mediation service policies with respect to child abuse, see Appendix A-1.

mediators concerning the acceptable limits to mediators' use of substantive power. We have seen that none of the practitioners thought mediators should make final decisions for disputants, but that they were divided in their views of the amount and type of substantive power mediators should exercise short of that. This is in keeping with the mediation literature where we find that, while disputant decision-making is identified as an essential ingredient of mediation, so also is the exercise of power or control, at least at moderate levels. Simply by intervening in the dispute the mediator is exercising some control over the disputants' decision-making process. Thus the assumption of power by the mediator affects the abilities of disputants to make their own decisions to greater or lesser extents. When Greater London's mediators held differences of opinion about the extent to which mediators should intervene in the decision making process, it was usually because they held different perspectives on the importance of professional expertise and child protection. Those who highly valued professional expertise or child protection tended to advocate more direction and interference than those who emphasized the importance of disputant-decision making. When we examined some of the ways in which the mediators balanced these issues we found that the majority of the practitioners, while not ignoring the importance of professional expertise or child protection, did suggest the use of methods that tempered them with promoting disputant autonomy and decision-making. Here again we encounter the reciprocal influences of the attributes of mediation being identified and yet another example of the centrality of disputant autonomy for Greater London's mediators. If disputant decision-making was being given more weight than professional expertise, how did the mediators propose to educate disputants so that the decisions they made would be informed ones? Here we encountered the importance of mediators offering disputants balanced information that expanded their options, rather than professional advice that directed or limited them.

As part of our examination of the mediator's views on their own role vis-a-vis children, we examined the child-related practices of Greater London's mediators. We

discovered little consistency among the practitioners and found that, with the exception of an agreement on the need to include adolescents at some point in the mediation process, the mediators were divided in their opinions about the advisability of including children. When we looked at some of the methods being used to include children, we found justification for practitioners' concerns. Some of these processes allowed children to make the custody, access, and visitation choices. They subjected children to high levels of pressure and tension and placed upon them undue responsibility for their own destinies. When used in the courts, the implications of these processes were nothing short of frightening. We also found, however, that when children were included in other ways, this could expand their parent's abilities to make their own decisions providing that the children were not given direct or indirect responsibility for the decisions to be made, and provided also that the mediators were careful not to become advocates for the children's positions. Very few (15.7%) of the mediators illustrated in their comments or recommended in their answers that mediators become child advocates. Most of those who did so were court-welfare officers, but even among court-welfare and probation officers, this was a minority (24.4%)[64] position. The majority of the practitioners suggested ways that mediators might promote the interests of children while also encouraging rather than hindering disputant autonomy.

Throughout this chapter we have used the terms 'disputant autonomy' and 'disputant decision-making' almost interchangeably because our focus has been on substantive or decision-making power. In chapter 6, when we examine the use of procedural power by the mediator, we shall find that many practitioners defined the term more broadly to include the right of families to expect the least possible interference in their affairs. Let us turn to consideration of the procedural components of mediator power and the third major theoretical division among Greater London's mediators: dispute resolution versus therapy.

64 See footnote 62.

CHAPTER 6

Procedural Power and the Role of the Mediator

Introduction

In chapter 5 we examined the mediators' understandings of disputant autonomy and how that goal affected the practitioners' perspectives on the use of substantive power. Here we shall focus on the relationship between disputant autonomy and the mediator's use of procedural power. When mediators exercise procedural power they do not necessarily direct disputants towards a particular decision outwardly but they may do so indirectly by controlling the issues to be considered and the range and depth of those issues. We shall divide our discussion into two sections. First, we shall examine the implications of mediator behaviour that controls the mediation process and limits the scope or depth of the issues to be considered; second, we shall examine mediator behaviour that expands or changes the issues by incorporating therapy.

We shall find that the practitioners, although they did not approve of mediators assuming decision-making power in mediation, did approve of mediators assuming procedural power. We shall find that this approval was not necessarily at odds with the practitioners' endorsement of the importance of disputant autonomy documented in chapter 5. It appears that the use of procedural power may or may not be directive and may or may not inhibit disputant decision-making. It depends on the timing and the methods used, also on the type of procedural power that the mediator seeks to exercise. In particular the mediators tell us that structuring sessions, focusing discussions, and enforcing procedural rules can be directive if implemented incorrectly or at inappropriate times but can expand the ability of both disputants to participate

fully in the resolution process if implemented correctly and in a timely fashion. We cannot, therefore, classify all procedural rules and interventions as directive.

Therapeutic procedural interventions appear to be an exception to this. The practitioners provided many examples of directive therapeutic behaviour in dispute-resolution processes. The majority thought therapy too directive and too intrusive for use in mediation. We shall find that those who argued in favour of therapeutic approaches usually stressed the importance of professional expertise, rather than disputant power. In chapter 5 we saw that the mediators who emphasized the importance of professional expertise tended to be more directive in orientation.[1] We shall find that the views of this minority had more in common with the therapeutic than with the mediation literature. While most practitioners did not recommend therapy in mediation, neither did they recommend holding disputants to purely rule-bound, rational negotiations. Most stressed the importance of helping disputants explore, within limits, emotional and relationship difficulties. They spoke of the importance of acknowledging and being empathetic to these difficulties but did not think that it was the place of the mediator to attempt to treat or cure them. We shall find little support in the mediation, family-therapy, and research literature for the views of the minority but considerable support for the views of the majority and for the benefits of empathetic conflict-resolution.

Procedural Power, Part 1: Structure and Focus, the Views of Greater London's Mediators

Donohue and Weider-Hatfield (1988), L. Marlow (1987), Salius and Maruzo; and A. Taylor (1981) categorize the establishment and enforcement of mediation rules, such as: the enforcement of agendas, rules for disclosure, and the enforcement of limits on the focus of discussions, as directive, power-assuming behaviour on the part of the

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1 See also Chapter 10 (on professionalization).

mediator. In chapter 5 we saw that Greater London's mediators stressed the importance of disputant decision-making and were guarded about mediators using substantive power. Here we find that they were less concerned about and even approved of the use of procedural power:

> [The mediator] has got to have a fairly high degree of self-confidence to be able to intervene at the appropriate time. That and communication skills are most helpful. Not only how to communicate and not communicate but how to get them communicating in the first instance. That is skill number one .. [also] setting boundaries and rules, which is really the first one I said: not to let them rattle on about everything under the sun. An ability to understand communication and to moderate that so that it becomes more moderate and rational. (in-court conciliator)

> I've watched [another mediator] several times and she has such clarity. I tend to get more woolly and mixed up. She sees her role purely as a conciliator, not as a counsellor and so when something comes up, she will deal with it, not in a dismissive way but she will say, "Yes, I understand that", but will come back and focus very clearly. I know it is quite easy to get seduced into going down a different road. I think that is important: allowing feeling and ventilation but not getting stuck on the personal thing. ... It is discipline. Her ability to do it so well. It isn't uncaring or dismissive but saying, "This is the bit we must focus on". (out-of-court conciliator)

> [One of the most important techniques is] being structured and focused, slowing down the process: to keep control of the interview so it is safe for the clients to express whatever they need to express but at the same time to put limits on that: to say, "Where do we go from here?"; to keep the focus on future planning rather than past recrimination. (out-of-court conciliator)

Almost every Greater London mediator recommended procedural rules, limits and controls of some sort on communication. We can examine the ways the mediators structured their mediation sessions in Appendix A-1. Sixty-three (63.0%)[2] of Greater London's mediators were working in mediation services which imposed strong procedural limits, which offered clear structures and rules of procedure, or which limited the time and depth devoted to the disputants' discussions because of the limitations inherent in Greater London's in-court mediation programmes (see Appendix

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2 Two practitioners who were doing family work are not included here because, while their sessions were structured, the structure they were using was for therapeutic rather than for dispute resolution purposes. See Service #16, Appendix A-1.

A-1 and Chapter 3 for details). How do we reconcile these views, structures, and rules with the mediators' emphasis on the importance of disputant autonomy in chapters 4 and 5?

Individually the mediator's preferences ranged from those who sought to impose little structure to those (the majority: 63) who were most comfortable with a clear structure and procedural controls. For example, the following mediators describe processes which offer little structure:

> *[What do you see as your role in the process?]* Whatever role they give us. Sometimes we are just mediating or conciliating, sometimes we are the good or bad other party: someone to act out their anger on. Sometimes we are really their parents ... So the role is what they give us. (out-of-court mediator)

> They [the members of one of Greater London's mediation services] just start together in whatever way. Sometimes they do a whole separate interview, sometimes two separate interviews. They may see each one separately. Sometimes they don't even see them together at the end. They don't have a process of [seeing them] separately and then together, which I like. The reason they give is that they don't like a structured process ... I don't know why they can't fit that into their family systems approach. (out-of-court conciliator)

Other mediators thought that some structure was appropriate but that it should be flexible and thus adaptable to disputant needs:

> We don't use an inflexible process, but broadly speaking, yes. First the introduction: explaining the ground rules, checking out that they understand the ground rules .. Negotiating an agenda for the first session and maybe the second session as well: "we will do such and such today and leave such and such for the next time we meet." .. There seems to be a tendency for people to have their method and they go in and practice it; the same method applied to everyone ... There is not enough flexibility or enough conscious selection of what particular technique will work with this particular couple with this particular problem at this particular time. (out-of-court mediator)

Still others were most comfortable with strong procedural guidelines and limits on the scope of discussions:

> [I think the role of the mediator] is to create a safe environment where people can use their rational abilities to the fullest extent, and to maintain control over the proceedings so people can feel they are free from intimidation, pressure and from each other. To see that there is fair play so people can begin to communicate in a way which doesn't belong

to their old marriage. (out-of-court conciliator)

I think it is about providing a structure for people in the midst of something really very heated; actually saying we are not going to let this get out of hand too much: "We are going to let you blow your top but we are not going to let the whole roof blow off." It is about keeping the thing on the move so it doesn't get stuck in just emotional ventilation, which, although it has value, if you are going to spend 2 1/2 hours doing it, is a waste of time. (out-of-court conciliator)

While a study of this nature cannot generate definitive answers on the advantages and disadvantages of structures and procedural rules, it does nevertheless allow us to make some general comments and suggestions for further study. For example, mediators may endorse both the use of procedural power and the importance of disputant autonomy in mediation because procedural rules, focussing discussions, and providing clear structures do not necessarily inhibit disputant decision-making. It is important to consider timing and methodology: the same rule can be directive if implemented in one way and can expand disputant decision-making power if implemented in another. For example, Greater London's mediators offered several examples of controls that, if implemented in the manner stated, would be extremely directive. Those are followed by examples of similar controls which, if implemented in the manner stated, would enable the disputants to explore their own situations more fully. First, some directive examples:[3]

I try initially to say, "you are acting like a steamroller. Your husband is finding it difficult, I am finding it difficult. Let's talk about how long you've been talking and how little listening. I do that all the time: I say, "You are talking too much, you are being over bearing. (in-court conciliator)

I just say, "Shut up. Let your husband or wife speak". I start off by telling them they will each have their turn to speak. (out-of-court conciliator)

I am always aware of the dominant person and if necessary I will attempt to shut them up - we have that power - and [will] support the person with less power and if necessary, even talk for them. (in-court conciliator) [4]

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3 Most of these examples were taken from the practitioners' responses to a question concerning appropriate methods to use in cases involving power imbalances, hence the focus on that issue.

4 Obviously, as well as being examples of mediators recommending the enforcement of rules in a

Now some examples of mediators who suggested similar rules but recommended enforcement in ways that were expansive rather than directive:

> [I deal with a power imbalance] by making sure the parents have equal space, giving the weaker party plenty of space, making him or her feel safe. (out-of-court conciliator)

> Personally I think it is easier to deal with the person who is railroading than it is to patronize the one who is being railroaded. Basically [I] try to support the person who is railroading so they don't have the need to do it. We have been working with [named therapist] who works at Great Almond Street about this. Basically it is siding with the aggressor ... To say, "You sound very angry, it must have been bad for you". Somehow that diffuses it. It is hard for a person to keep coming up in that vein if there is nothing to come up against. The alternative is to side with the person, to bring the other in all the time. The danger is that you may appear to be siding with them and if that goes too far, then you've lost them. (in-court conciliator)[5]

> Well [you deal with power imbalance] partly by seeing where the power lies and making sure you address the person who ostensibly has perhaps less power and by making sure that everyone is able to present their views ... Also by being fairly active in the session and making sure the time allotted to each is equal, making sure each person has the same amount of responsibility for decisions and if one person is being undermined or discounted, to highlight what they are actually contributing to the session. You want to end with a meeting where each person ends up feeling they have been heard. (out-of-court conciliator)

The directive mediators and the expansive mediators were trying to enforce the same procedural rules (ensuring that all disputants were provided with the opportunity to participate equally) but the methods of implementation were directive in the first examples and expansive in the second. Perhaps, within limits, the ethos of disputant autonomy and the duties of the mediator to remain objective and unbiased are more important to disputant autonomy than the particulars of the model being applied. Perhaps it is inaccurate to link structure, the enforcement of procedural rules, and the

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directive manner, these are also examples of poor practice.

5 This mediator is discussing the use of a communication strategy he learned from a therapist that he found to be helpful in mediation. The form of communication he is talking about does not take away disputant power and it appears that it might be helpful in the dispute-resolution process. In the next session we shall see the problems being created and the disputes which are arising because some people are referring such strategies as 'therapeutic methods'. They are not. The mediator is not providing therapy or counselling here but is merely using a communication aide in a dispute-resolution process. The aid just happens to have been learned from a therapist.

maintenance of the focus of discussions together with directive behaviour without also considering the mediator's timing and methods of enforcement, and their effects on the disputants.

Let us consider this issue as we look at a synthesis of the research literature on mediation and the use of structural and procedural rules. The research points tentatively[6] to the following conclusions. It appears that mediators who use and enforce rules of procedure in mediation are more successful than those who do not,[7] especially if the enforcement of procedural rules is done evenly between or among the disputants.[8] It also appears that disputants appreciate clear structures;[9] and that private caucuses[10] are not only appreciated[11] but also help to produce positive results, particularly in cases involving high degrees of hostility and tension.[12] Disputants also seem to appreciate mediators who can keep discussions on track or focused on the issues needing resolution.[13] These studies indicate that procedural guidelines and structured sessions may promote rather than hinder disputants in the resolution of their own disputes. Perhaps this is because many procedural rules have been developed by mediation services in order to encourage communication and the exchange of information between or among the disputants. (For examples, see Appendix A-1.) Consequently, some procedural rules and structures may enhance rather than limit disputants' abilities to

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6 I use the word 'tentatively' because some of the studies referred to here do not involve many cases; are not exclusive to family issues; do not fully explain the methods being used by the mediators or the ways in which the mediators were applying those methods. The results of one study, the Newcastle Report, are questionable since we have no way of knowing if the consumers quoted were representative of the total number of consumers using the services studied.

7 D. Brookmire and F. Sistrunk (1980): 323-326; W. Donohue, M. Allen and N. Burrell (1985): 86-87; W. Donohue, J. Lyles and R. Rogan (1989): 26; W. Donahue and D. Weider-Hatfield (1988): 297, 314; J. Pearson and N. Thoennes, 'American' (1988): 76-78; D. Pruitt, N. McGillicuddy, G. Welton, W. Fry (1989):368; L. Vanderkooi and J. Pearson (1983): 557.

8 W. Donohue and D. Weider-Hatfield (1988): 307, 308.

9 Newcastle Report (1989): 366.

10 Sessions or parts of sessions held with the mediator(s) apart from the other disputant(s).

11 G. Davis and M. Roberts (1987): 43; Newcastle Report (1989): 366.

12 J. Hiltrop (1989): 252, 255; D. Pruitt, N. McGillicuddy, G. Welton, and W. Fry (1989): 284-285; K. Kressel (1987): 226.

13 J. Pearson, and N. Thoennes (1984a): 32; J. Pearson and N. Thoennes (1988a): 76.

make their own decisions, in spite of the fact that enforcement means that mediators exercise some degree of power or control. We have seen that the same rules and processes can be applied in very different ways. Probably, within limits, the methods of application and enforcement of procedural rules are as important as the rules themselves. Future research should give us some guidance on this issue.

Related to the issue of structure and procedure is the question of depth. Procedural rules can do more than balance and focus discussions and encourage disclosure. They can also focus the discussion on certain topics, thereby excluding consideration of other matters, or they can expand the matters to be considered by adding, for example, an exploration of personal, interpersonal, or family psychological and relationship problems existing outside the parameters of the conflict or dispute. This brings us to the second, related procedural issue: the place of therapeutic processes in mediation.[14]

Procedural Power, Part 2: Mediation and Therapy, Where do Greater London's Mediators Draw the Line?

Introduction

Most of the mediation literature defines mediation and family therapy as different processes.[15] We continue to encounter authors, however (probation and court welfare officers in England among them) who continue to argue that the two processes are similar or should be merged.[16] Greater London's mediators reflected this difference of

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14 Here we shall discuss this topic generally. For discussion of the perspectives of the mediators concerning mediation's boundaries with psychotherapy, family systems, and counselling, see chapter 12.

15 See for example the distinctions made by: D. Brown (1982) 30; E. Brown (1988) 131-132; G. Davis and M. Roberts (1988) 8-9; J. Kelly (1983); P. Maida (1986); A. Milne (1984) (1985a) (1985b) (1988); A. Milne and J. Folberg (1988); M. Roberts (1988) (1990); M. Robinson (1986); A. Taylor (1981); J. Weaver (1986).

16 For example: J. Amundson and L. Fong (1986); H. Gadlin and P. Ouellette (1987); J. Guise (1983); J. Howard and G. Shepherd (1987); H. Irving and M. Benjamin (1988); National Association of Probation Officers (1984); J. Price and D. Handley (1989); J. Pugsley, J. Cole, G. Stein and E. Trowsdale (1986); R. Power (1988); G. Shepherd, J. Howard and J. Tonkinson (1984); J. Walker (1988). English probation and court-welfare officer authors also endorse the merger of mediation, therapy, and welfare investigation.

opinion. In keeping with the majority views discussed in chapter 4 most practitioners emphasized the dispute or conflict-resolution nature of mediation. We also find, however, that a strong minority recommended the inclusion of therapy or therapeutic processes in mediation. We looked at some examples of therapeutic processes being used in mediation in chapter 3 and in Appendix A-1 (services 13 to 17). There we saw that the therapeutic mediation services had different goals and used different methods from the dispute- or conflict-resolution services. As we examine the mediators' views on the place of therapy or therapeutic approaches in mediation we shall find that the theoretical divisions among the mediators were not absolute, that the views of one group of mediators tended to blend into the views of another. In order fully to understand the practitioners' understandings of the relationships between disputant autonomy, mediation, and therapy, therefore, it is necessary to examine the practitioners' opinions in some depth.

Before we begin that examination, let us look briefly at some of the conclusions we can draw from the family therapy and mediation literature. Family therapy takes many forms. Behavioral family therapists seek to isolate and change problematic behaviors; psychotherapists work with the subconscious towards healing the inner emotional or psychological problems of family members; family-systems therapists try to resolve family problems by altering family structures, or roles, or interactions, or relationships, or perceptions of reality (depending on the adopted school of thought: see Chapter 12); the social-learning therapists try to promote therapeutic change in families by teaching them new forms and methods of social behaviour; others subscribe to broader systems perspectives and seek, for example, to assist families in their interactions with and relationships to the social, political and economic institutions in their societies. There is little coherence in the knowledge or methodology that one can identify as 'family therapy'.[17] This makes it difficult to differentiate it from

17 G. Barnes, (1984); A. Gurman and D. Kniskern (1981): 744; H. Johnson (1986): 299.

'mediation'.

The family therapy literature suggests some general attributes, however, that apply to all family therapies.[18] These enable us to conclude, from the mediation and family therapy literature, that mediation and family therapy differ in what they seek to accomplish and in the balances of power between the disputants and the worker(s) within the processes. Where therapists try to help their clients change or resolve (or give them the tools to change or resolve)[19] problematic relationships, emotions, roles, perceptions, behaviors, or patterns of interaction and communication, mediators attempt to help disputants manage these problems within the dispute-resolution process. Mediators also help disputants to create practical arrangements that will alleviate the effects of those problematic relationships, emotions, roles, etc.; unlike therapists, they do

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18 a) Family therapy references: T. Anderson (1987): 415; H. Aponte and J. Van Deusen (1981); M. Argyle (1972); J. Bancroft (1985); G. C. Barnes (1984); C. Barton and J. Alexander (1981); E. Beal (1981), (1985); I. Bennan (1985), (1988); J. Bloom-Feshbach and S. Bloom-Feshbach (eds.) (1987); N. Brown and M. Samis (1986/7); J. Burnham and Q. Harris (1988); P. Caille, P. (1982); D. Campbell and R. Draper (eds.) (1985a), (1985b); D. Campbell, P. Reder, R. Draper and D. Pollard (1983); D. Campbell, R. Draper, and C. Huffington (1989); G. Cecchin (1987); V. Cronen and W. Pearce (1985); M. Crowe (1985); D. Daniell (1985); W. Dryden (ed.) (1985a) (1985b); W. Dryden (1985); W. Dryden and P. Brown (1985); W. Dryden and P. Hunt (1985); W. Dryden, D. Mackay, T. Schroder, and A. Treacher (1985); B. Duhl and F. Duhl (1981); N. Epstein and D. Bishop, D. (1981); I. Falloon; L. Feldman (1982); D. Freeman and B. Trute (eds.) (1982); L. Fruggeri, D. Dotti, R. Ferrari and M. Matteini (1985); H. Gadlin and P. Ouellette (1986/7); N. Golan (1978); L. Gold (1985); I. Goldenberg and H. Goldenberg (1985); J. Goldman and J. Coane (1977); A. Gurman and D. Kniskern (eds.) (1981); J. Haley (1987); F. Hollis (1964); D. Howe (1989); M. Isaacs, B. Montalvo and D. Abelsohn (1986); H. Johnson (1986); S. Kaplan (1977); F. Kaslow (1981); J. Kelly (1983); D. Mackay (1985); MacKinnon, L. (1985); P. Maida (1986); D. Malan (1986); F. Martin (1985); B. Miller and D. Olsen (eds.) (1985); A. Milne (1985a); S. Minuchin (1974); S. Murgatroyd (1985); K. Nuttal (1986); D. Olson (ed.) (1985); D. Olsen and B. Miller (eds.) (1983); P. O'Reilly and E. Street (1988); M. Robinson (1986b); G. Sargent and M. Bleema (1986/7); V. Satir (1967), (1987); M. Selvini Palazzoli, L. Boscolo, G. Cecchin and G. Prata (1977), (1980); D. Shearer (1990); B. Sheldon (1982); D. H. Sprenkle and C. Storm (1981), (1985); M. D. Stanton (1981); E. Street and W. Dryden (eds.) (1988); K. Tomm (1985); A. Treacher (1985), (1987); J. Turner (1972); V. Ugazio (1985); J. Walker (1988); J. Walker and M. Robinson (1990); S. Walrond-Skinner (1976), (1987); S. Walrond-Skinner and D. Watson (eds.) (1987); D. Watson (1987); G. Webb (1972); D. Weisfeld and M. Laser (1977); M. Wham (1983); H. Yahm (1984).

b) Some of the distinctions that have been made, for example, that therapy focuses on the past and mediation on the future; apply to some forms of therapy and not to others. For references to some of the authors who have provided us with distinctions between family therapy and mediation, see also footnote 15.

19 Theoretically, the Milan school of family therapists do not seek change or resolution. They seek merely to offer the family tools that will, in the view of the therapist, enable the family to change or resolve its problems if the family wishes to do so.

not seek to change their fundamental nature or to resolve them. Mediation has a narrower focus. Mediators seek the reduction of conflict and the resolution of disputes.[20]

The second difference, the difference in the balance of power, is related to the first. Therapists do things to people. They re-define problems presented to them. They are the experts who hold the keys to change. In mediation, as we have seen, the disputants, not the mediator, hold the keys to their dispute resolution and conflict reduction. This means that, to a great extent, the disputants and not the worker(s) are the experts in the mediation process. This is not to deny the fact that disputants sometimes will need to be given information about the options available to them, will need to be guided in an exploration of the consequences of accepting one of those options if they are to make informed decisions. In Chapter 5 we discussed the importance for mediators to develop methods of giving information that promote rather than hinder disputant autonomy, and to develop methods of dealing with the problems of balancing disputant autonomy and 'expert' responsibility. We saw the process can change quickly from one in which decision making rests squarely in the hands of the family to one in which the 'experts' gain an control over family life. This is of especial concern in property and financial mediation. It is even more cause for concern should therapy or therapeutic methods become part of mediation. We shall turn to the practitioners' views about the inclusion of therapy and therapeutic processes in mediation shortly.

Before we do so, it might be wise to clarify two areas of confusion. The first is that it is important to keep in mind the difference between the terms 'therapy' and 'therapeutic'; for example:

> You've got to be clear about what you are trying to do. I don't believe mediation is a form of therapy. I believe there may be a therapeutic spin-off. (out-of-court conciliator)

20 See also chapter 4.

> I don't see it as therapy. It is therapeutic in result. It is therapeutic to have reached a decision or to go away knowing where you stand but I don't see it as therapy. It is obviously conflict resolution. (in-court conciliator)

No doubt it may be therapeutic to resolve a dispute and to reduce conflict, through mediation or otherwise. This does not mean that one is engaging in therapy or a therapeutic process merely by engaging in a dispute resolution process, unless, of course, one is willing to argue that interpersonal negotiations, bipartisan negotiations through lawyers, and other forms of dispute resolution are forms of therapy. The statement that mediation and therapy are different processes should not be taken to suggest that mediation can never produce a result that is therapeutic, only that its goals and methods make it a different process.

The second area of apparent confusion involves the use of the terms 'dispute' and 'conflict'. Throughout this study we have use these terms almost interchangeably. J. Folberg, however, suggests the need to distinguish between them.[21] He argues that 'conflict' is wider in scope, potentially including underlying causes and psychological factors. While this distinction is very helpful, and while it is important that we keep it in mind, we shall not be using the distinction in this study because, as we shall see shortly, most of mediators in Greater London envisioned mediation as lying somewhere in between: most sought to provide a service that was broader and deeper in scope than the term 'dispute resolution' would imply, but narrower than the full scope of 'conflict resolution'. Let us turn now to the views of the practitioners.

Mediation and Therapy: The Views of the Practitioners

None of Greater London's mediators sought to limit mediation to purely rational, rule-bound negotiation sessions excluding any discussion of the emotional and relationship components of the disputants' problems. Those who advocated boundaries and a dispute

21 See, for example: J. Folberg (1983): 8.

resolution focus included these components but warned of the need for limits and boundaries. They argued as follows:

> You have to acknowledge feelings. If you don't you are not dealing with the meat. But from there, you take them on board and you say, "I acknowledge that, I understand, I hear you" but we don't actually do more than that. (out-of-court conciliator)
>
> I think an acknowledgement of how badly they might feel is important but only that. The distinction between mediation and therapy is that one is not dealing with those feelings in a restorative, therapeutic way. If you start getting into that, in my opinion, you can say goodbye to negotiation. (in-court conciliator)
>
> I think it is quite helpful sometimes, although you don't deal with it, to acknowledge and to hear some of the things that are being said. I find that really does move people along sometimes. People say something and all you need to say is, "I hear what you say and I understand you are very upset and angry about that. I'm sorry about that" and move on. You can't just exclude feelings, I just don't see how it is possible. ... but maintenance of the boundary is very important because if you chase all these relationship tangents the negotiation over the issues will still need to be resolved and will probably be rushed and not enough attention will be paid to those details so people will feel under pressure and will feel they have had insufficient time. (out-of-court mediator) [22]

The debate among the practitioners concerned the amount of time that should be devoted to these discussions and the mediator's role with respect to the issues raised in them. Should the mediator do more than hear, understand, and acknowledge the emotional, relationship, and psychological problems that disputants express? Should he or she also be seeking to change or alleviate them? None of the practitioners questioned the need for mediators to help disputants create their own practical rules and guidelines to govern their future relationships: new rules, for example, to govern the interactions between the parents to protect their separateness and privacy while still allowing the children to have contact with both. The debate concerned whether or not the mediator should go further and attempt to restructure, change, or correct personal problems, interactions, or relationships.

When the comments of the mediators across a broad range of topics were

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22 For similar concerns, see: J. Haynes (1989): 11.

examined,[23] it became clear that the majority of the practitioners (80) placed primary emphasis on dispute-resolution and conflict reduction; eight placed primary emphasis on the advancement of the interests of children; thirteen on achieving therapeutic results. (Not all of these thirteen would say that they were practising therapy, yet they were attempting to do more than to resolve disputes and conflicts; for example, they also wanted to change relationships, promote long-term psychological health, or heal dysfunctional families.) When asked specifically how they would like to see mediation develop in the future, seventy mediators advocated that mediation retain a dispute- or conflict-resolution focus. Of these, twenty-five appeared to advocate the inclusion of some elements of counselling or therapy in the process. Eighteen hoped to see the development of both mediation and therapeutic services, but as separate, not combined services; another nine hoped mediation would develop a therapeutic focus. Five mediators did not address the question.

Earlier we pointed out how mediators' answers tended to blend into one another. Not surprisingly the figures just recited do not tell us very much. Only forty-six of the eighty mediators who placed primary emphasis on dispute resolution had an orientation that one could identify as approaching pure dispute resolution, i.e.: maintaining a firm focus on the matters in dispute and setting and maintaining limits on the amount and depth of emotional and relationship discussions and discussions of past history. Twenty-three were prepared to offer a limited amount of counselling or therapy within the process; another eleven were prepared actively to promote the best

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23 Interview answers were indexed under the questions asked and then again under various topics and cross referenced. For example, a discussion of the personal characteristics needed to practice mediation might spark comments on the role of the mediator within the process; comments about the need for education and training in family-systems theory might generate comments about the role of therapy in mediation. In these cases, the comments were filed under all relevant categories. To determine each practitioner's theoretical emphasis in mediation, I looked at each practitioner's definition of the mediation process; description of the goals of the process and the mediator's role within it; understanding of the client or focus in mediation; attitude towards therapy in mediation; orientation to child protection and advocacy; recommendations for redressing unfair agreements; and finally, at any examples of directive behaviour on the part of each mediator.

interests of children. Furthermore, all those who placed primary emphasis on promoting the best interests of children placed a strong secondary emphasis on the resolution of disputes and reduction of conflicts; so did ten of those who placed primary emphasis on therapeutic goals. What the majority of mediators were debating was not rational, rule-bound negotiation versus therapy, but the degree to which mediators should engage in counselling and therapeutic processes within the dispute-resolution process.

Perhaps a look at some of the comments of the practitioners representing the range of mediator opinion will help to clarify the practitioners' different perspectives. Only three of the mediators preferred to give their clients a therapeutic instead of a dispute-resolution process:[24]

> We don't think dispute resolution works across the board. That model doesn't help families who are unable to take decisions because of something about the dynamics of their relationships. That model doesn't address those relationships and if you don't address those relationships, you are not going to solve the problem ... We are not into agreements; those are only a by product, but the long term health and functioning of the family. ... Where there has been some progress, we would see those as being successful. There may still be a dispute about custody and access but they [the family] are far more equipped to deal with things even though the judge might still have to make a decision about custody and access. (Two out-of-court conciliators)

Another ten preferred to mix time-limited therapy with dispute resolution:

> We make strenuous efforts to work together, the rest of us work behind the screen. ... that is the family therapy way. ... We excuse ourselves from the couple and then prepare a hypothesis, what we think is the difficulty ... so we use a lot of family therapy skills but it is not therapy and we make that very clear. ... The [focus of our work] is the relationship of the couple, how they can give up their husband and wife relationship ... yet hold onto or even build in some cases a co-parental relationship. ... The primary goal is to enable the couple to change sufficiently to begin to wish to reach some agreement. ... We operate on trying to achieve some degree of agreement within six sessions. (out-of-court conciliator) [25]

> I don't think you should be doing therapy if they don't want it but I find it very difficult to divide it out. ... If the husband and wife are able to sit down and logically work out the arrangements, if it was a question just of practicality then clearly that could be done between themselves or

24 These differences of view shade into one another. I have tried to use quotations illustrating the range of opinion within categories.

25 Only four of the ten used viewing teams and one-way windows or video cameras.

> with a solicitor who is a better person to advise on the financial and legal implications. The problems seem to me to come when there are all sorts of issues of trauma which are interfering with those decisions and if you are going to look at those then you are getting very close to therapy. (out-of-court conciliator)
>
> They both have their functions in a different context. Some people know themselves very well and are able to view themselves and in that case you are really just dealing with the dispute resolution. If it isn't' that then you really have to more work to do, to fill in the gaps, and then you do need a therapeutic model as well. (out-of-court conciliator) [26]

Several of these ten claimed not to be practicing therapy but merely using therapeutic tools. It should be clear from the quotes, however, that these practitioners had therapeutic goals in mind and that the tools they were using were being used therapeutically rather than for purposes of dispute resolution.

Twenty-eight mediators thought some emotional or relationship assistance should be offered in addition to dispute- or conflict-resolution assistance but did not think therapy appropriate. These practitioners were prepared to look at past, present, and future relationships and emotions in more depth than were those who subscribed to dispute-resolution models; and/or they were prepared to offer some limited counselling in the process:[27]

> I favour something in the middle which is not really either [therapy or dispute resolution]. Many times people need a pre-mediation session or sessions to look at emotions. In England people are wary of referral and don't use therapy. In the U.S. people often are in therapy at the same time as mediation and referral is much easier. That makes it more difficult in England. The focus of mediation is different. The purpose is not to explore and develop the underlying feelings but where people are blocked because of their emotional turmoil it is important to acknowledge those feelings, the ones which may influence decisions people make in mediation, and to acknowledge them and reflect them back. ... So if they have acute emotional distress it is appropriate to refer them if possible or if not, to have a pre-mediation stage in the process. (out-of-court mediator)
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> A lot of voluntary people think, 'Oh this is easy, we will just get them

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26 These mediators were talking about different kinds of family therapy. The first quote was taken from a member of a group using a family systems model. Any interventions will be directed towards altering the interactions or relationships between people. The interventions will not be directed to inner personal, psychological change. The other two practitioners are using the term 'therapy' in the latter sense.

27 Mediation and non-directive counselling have more in common than do mediation and therapy. For further discussion, see Chapter 12.

> together and say, "well what do you want and what do you want or why don't you do this or do that"'. Well that's nonsense. It is the pull-yourself-together school of mediation. It ignores. I am prejudiced against the conciliation model: ... "Ok forget everything that went before, let's see what we can work out"; because I often think it is much too complex for that. (*Because there is not enough about their feelings about the situation?*) Yes, and it's history, it's historical context; which is why I suppose I try to see people separately, to get that out of the way so that it then becomes possible to focus on the children. (in-court conciliator)
>
> [Interview with two in-court conciliators] A: It is a false split if you are dealing with clients who are splitting up. It is a question of balancing the past and the present. The two are mixed up with each other. ... Or this silly business of giving people a few minutes to ventilate about the marriage. ... B: The wish to make everything cut and dry is a danger for conciliation as much as for everything else.
>
> There is a therapeutic element and it seems to me that mediation can offer something which is middle ground. Everyone is saying it is not therapy and never the twain shall meet and I agree it is not therapy but it can offer a middle process for those who don't want therapy but who need more than simple dispute resolution, for those who want a middle course, to explore what people want to do and also the emotional issues. (out-of-court mediator)

Fifty-three[28] practitioners thought mediators should work within the parameters of a conflict- or dispute-resolution process and should limit their participation in discussions about interpersonal, relationship, and emotional issues to acknowledgements and expressions of empathy and to focusing on practical arrangements to be made for the future:

> It is very important that mediators make it clear to the parties what they are offering: an opportunity for the parties to discuss problems with the outcome of resolution, rather than for some long term benefit to their souls. (in-court conciliator)
>
> My preference is dispute resolution because therapy can take place in another setting. You want to reach agreement about the children if possible. . Maybe you need therapy to accept it or for support but let that occur outside. Let the decision be made in conciliation as soon as possible and as amiably as possible and then get on with therapy. (because of the time?) Yes, the time is so important to the children: that their lives are disturbed as little as possible. Their lives are upset and changing. The sooner arrangements are agreed and acted upon the better. (out-of-court

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28 The numbers are not exactly the same as those in the preceding paragraphs, when we were looking at the primary and secondary emphases of the practitioners, because we are no longer including consideration of 'promotion of the best interests of the children' and because we have now separated the inclusion of therapy from other forms of social assistance such as counselling.

conciliator)

> The dispute resolution approach, it must be the best. The therapeutic approach means you have to widen your boundaries endlessly. Some of the couples who come to you for therapy can be in therapy for years. ... It could take ages. If they wanted therapy I would give them therapy in another role. Conciliation is to resolve a problem. ... It would postpone the court hearing if you got into a therapeutic role and I don't think most people want that. They want to get it over and done with. [29] (out-of-court conciliator)

> The therapeutic approach evolves from views about pathology, treatment, dysfunction and when people come to make their own decisions that should have nothing to do with it. ... I think the crisis of divorce is not an excuse to view people as ill or disturbed. Also the therapeutic approach imposes on the parties the therapist's views of the situation which involves an assessment of what is going on; their past relationships, the dynamics [the way they interact] which I think has nothing to do with joint decision making. It is the parties' views which are important. (out-of-court conciliator)

The remaining eight practitioners were ambivalent or did not express a strong view on this issue.

Consideration of the practitioners' differences of opinion illustrated here will be important to our discussion of the education and training programmes that the practitioners proposed for new entrants to the field. If the majority (instead of a mere thirteen) had considered it part of the mediator's role to offer family therapy in mediation, the mediators would have suggested the need for beginning mediators to acquire an abundance of family-systems theory and knowledge about family interaction and role behaviour in order to provide the service. When we look at the practitioners' educational proposals on a subject-by-subject basis in Chapters 11 to 13 we shall see that the practitioners' opinions reflected the balance of opinion seen here. Dispute resolution skills were considered to be far more important than substantive therapeutic knowledge.

After our examination of the range of practitioner opinion about the appropriate placement of mediation on a rational dispute-resolution/therapeutic scale, it

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29 See also: K. Kressel, F. Butler-DeFreitas, S. Forlenza and C. Wilcox (1989): 66-67 for similar conclusions.

is important not allow the strength of the division to appear greater than it is. Some mediators who say they use a therapeutic perspective or therapeutic methods in mediation do not in fact do so. People tend to assume that knowledge or information gained from a particular discipline somehow belongs to or is exclusive to that discipline. This means that, for example, a communication technique learned in a family-therapy course will be identified as a therapeutic method rather than a communication strategy, even if the technique is not being used therapeutically but merely to encourage disputant communication and negotiation. This tendency to associate dispute-resolution tools with the discipline of origin has creating misunderstandings throughout the mediation field. Those who say they are using therapeutic methods are criticized by others who give reasons why therapy has no place in mediation;[30] those who claim to use therapeutic methods suggest that those who criticize them do not understand the differences between the application of therapeutic methods and the practice of therapy.[31] Lack of clarity has caused much of this debate.

Perhaps a look at some of the practitioners' comments will help to shed light on the issue. The mediators quoted here talk about using methods drawn from family therapy in mediation. They then proceed to give examples of dispute-resolution methods that they have isolated and removed from that field. (The two quotations that follow refer to family therapy; claims of disciplinary origin were not exclusive to therapy. We shall encounter the problem again when we look at the practitioners' opinions about the education and training needed by future mediators on a subject-by-subject basis in chapters 11 to 13.)

> [*This quotation was taken from an interview with two in-court conciliators*] A: I've been doing family therapy clinics at Tavistock and certainly . ... whilst I couldn't honestly say that all of systems theory and family therapy lends itself to conciliation, certainly what I've learned helps me to be a better conciliator. B: Certainly all the skills that have to do with traffic management rather than mechanics are helpful ... because what

30 For example: M. Roberts (1990).

31 For example: L. Parkinson (1987g).

> you are concentrating on is how people are interacting rather than internal causes. A lot of family systems skills are helpful: like reframing {we will be looking at this concept again in the education section} and paradox. I remember saying to one couple - the only thing they were left arguing about was education - and I remember saying that it was quite right to let the judge decide because it was far too important an issue for them. I hadn't got out of the door when they said, 'We've decided'. A: When we do conciliation, to a certain extent we do so in a vacuum and so it is hard to know what might or might not be useful. There are people who conciliate like ACAS[32] and they probably have very considerable conciliation skills and I don't know what those skills are and for me it would be very useful to go on some sort of ACAS conciliation training course.
>
> Family therapy has taught me a lot about engaging families which has been extremely helpful: about how when you have a family in the room that you don't lose any member of the family [during the discussions] but if you are trying to impose a strict family therapy model of whatever kind ... then I think you are in cuckoo land and it can be quite dangerous. What is frightening is that it is too simple and people [workers] like it because it gives them so much authority. (in-court conciliator)

The first two mediators offered a simple example of what is sometimes given the technical term 'paradoxical injunction'. (For a definition of the term, see Appendix A-1, Service 16.) It is clear from the quotation, however, that, whatever we might think of the use of paradox, the mediator was not acting therapeutically but merely trying either to jar the disputants out of an impasse in their negotiations or to end negotiations that were unproductive.

If communication is used in this way it becomes a dispute-resolution rather than a therapeutic tool. In these circumstances it becomes misleading to identify the tool as therapeutic. One might encounter discussions about the use of paradoxical communications in this manner during international conflict-resolution or labour-mediation courses. The tool, as described here, is not exclusive to, and not even particularly relevant to, family therapy. If, however, the practitioner uses paradoxical injunctions to produce or enable long-term change in the family's perceptions, interactions, or relationships, the tool retains its therapeutic character. It is only then

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32 ACAS stands for the British Advisory, Conciliation, and Arbitration Service. The service provides dispute resolution services in trade and industrial relation disputes.

that identification of the tactic as a therapeutic method is accurate. Similarly, the conciliator in the second quotation talks about how one conducts small group meetings, about the importance of balancing discussions so that all participants are given roughly equal attention and so that they all are actively involved in the discussions and their respective interests fully considered. It should be readily apparent that this skill or technique is not exclusive to family therapy. We might expect to encounter the same or similar techniques in a variety of disciplines which teach students how to chair meetings and/or how to help in the resolution of inter-personal, inter-group, or even international disputes and conflicts.

These spurious claims are not purposeful. They arise because most people are educated within disciplinary parameters and so do not realize that there is considerable overlap among disciplines in knowledge and perspectives. The mediation literature is riddled with this lack of realization. We might examine here three examples for purposes of illustration: M. Elkin (1987) at page 27 identifies empathy, positive regard for people, and establishing rapport as interpersonal therapeutic techniques; L. Gold (1982) at page 50 identifies defining needs and goals, classifying issues, separating emotional from financial issues, developing channels of communication, and attending to negotiation as part of a therapeutic focus; similarly L. Parkinson (1985b) at pages 259-260 suggests, among other things, that giving information about conciliation, defining issues, directing communication, exploring options, complimenting disputants, promoting negotiations, offering fresh solutions, and conflict management are all somehow connected to family-systems theory. Clearly, none of these activities are exclusive to the disciplines identified. Most are interpersonal or dispute/conflict-resolution skills. One can point to other disciplines that include these activities, or many of them, at least as thoroughly.

One hopes that mediators will derive useful dispute- and conflict-resolution tools from a multitude of disciplines, and that, as the professionals stop vying for family

mediation turf, it will no longer be necessary to make spurious claims of disciplinary origin. When the terms 'therapy' or 'therapeutic methods' are used in this study, the meaning is intended to be limited to behaviour that we can connect to therapeutic goals. Clarification is vital. If we are to be able to determine the education and training that mediators truly need, we must isolate the knowledge and skills that we can connect to the goals and process of mediation. It is important that we separate this knowledge and those skills from identification with any particular discipline or theoretical perspective. If not, we risk clouding mediation with other processes and encouraging the continuation of professional struggles to claim ownership of the field.

Our discussions about the incorporation of therapy or therapeutic methods in mediation are included in a discussion of disputant autonomy and mediator power. This may appear odd to some. It should not. Although therapy may not always be substantively directive,[33] procedurally it can be not only directive but also intrusive. This matter has not received the attention it deserves in the mediation literature.[34]

The lack of attention is not surprising. Mediators are making professional claims in an area previously occupied by a legal system that is rule-governed and directive, both substantively and procedurally. It is not surprising that proponents of the new process should concentrate on the shortcomings of the old. Sociologists tell us that this is a normal process: that an attack on current professional services is one the first steps any new group takes when it seeks professional recognition and status.[35] We do not need to look very far in the mediation literature for examples.[36] Perhaps the

33 This is not to deny that some therapists can be directive in substantive ways, particularly if they have a pre-conceived ideas about what a good or functional family should look like after divorce. There are some indications, for example, that many mediators, a number of whom are therapists, actively promote shared parenting and discourage split or sole parenting. See, for example: J. Earnshaw (1987); H. Irving and M. Benjamin (1987): 210; D. Saposnek, J. Hamburg and others (1984): 15.

34 For some of the notable exceptions, see: R. Abel (ed.) (1982); G. Davis (1982a); R. Dingwall and J. Eekelaar (1988); C. Greenhouse (1985); A. Milne (1984); M. Roberts (1988), (1990a); S. Roberts (1987); E. Szwed (1984).

35 For example: R. Dingwall (1977); P. Elliott (1972); W. Goode (1960). We discuss the advantages and disadvantages of the professionalization of mediation in Chapter 10.

36 See, for example, Chapters 1, 4, 8 and 12.

focus on substantive power and procedural rules and structure is also a reflection of the fact that professionals from mental-health and social-work backgrounds dominate the field.[37] It is often easier to see faults in others than to engage in critical self-examination.

Some forms of family therapy are almost devoid of the exercise of substantive power by the therapist; for example:

> [The following quotation is taken from a conciliator who used methods drawn primarily from the Milan school of family therapy:] We have first and foremost a deep seated belief ... that the majority of parents are quite competent and quite able to make decisions about their own children ... that the best interests of children lie in agreements between parents and not in the decisions of judges and welfare officers ... Our aim is not in getting agreements. It is helping them to establish their ability to negotiate with each other ... [We] add from an objective point of view what is going on within the dynamics of the family that might be preventing them from reaching a decision.

A worker using this model might not even participate in the final decision-making process. He or she might only tell the family what is preventing it from being able to negotiate, leaving responsibility for any substantive negotiations in the hands of the family members. Even when therapists do not use substantive power, however, this does not mean they are not being directive. Therapy can be directive in other ways, as some of the other mediators working in Greater London pointed out:

> The fantasy is that the courts have too much power over people and that if you get an investigation ... that you are removing power from them, but two social workers together deciding when it is convenient for them to see them, they are not exercising power? And stopping the family from having access to the courts if they want access to the courts, and making them feel guilty. I'm wholly against the growth of welfare in this way. I think it is mad. And when you have two people who don't have a lot of power or who are muddled, it is very easy to say, "I think what you ought to do is come and see us and we'll sort it out together". What are they supposed to say? ... If the choice is between welfare and law, I would choose law. I don't think people should be at the mercy of people like us who think we know best. ... Who likes to be in the clutches of social workers while they waffle away with their so called conciliation and therapy and it takes nine frigging months to come to court? Parents

37 See chapter 2. See also: D. Camozzi (1987); Department of Justice (Canada) studies (1985)(1987)(1988); A. Milne (1983); J. Pearson, M. Ring and A. Milne (1983); J. Pearson and N. Thoennes (1988a); F. Perlmutter (1987).

> have the right to have a decision in a reasonable time. We know that parents find this time consuming business absolutely unbelievable. It is. If I was a parent, I wouldn't want a social worker near me. (in-court conciliator)[38]

> [Interview with two in-court conciliators] A: If you are truly conciliating there is no reason on God's green Earth why you would need more than two [conciliators] [*The officers are talking about mediation services which have one mediator in the room working with the disputants while a team views the process on a video screen or through a one way window*] You are not trying to change the family completely. Only as far as helping them communicate better as they present themselves, not trying to tinker with them. B: I'm not against, in principle, using tools like that in conciliation but I would need to be convinced that it is a tool of conciliation rather than something else which is being called conciliation, which is what I believe happens elsewhere at the moment. A: If they come to you and said, "We think our biggest problem is that we can't communicate. Will you help us?" and I say, "Yes, we use these techniques" then fine. But that is a different agenda. They have asked for therapy. But to have them, when they have no choice and come for a court-welfare report or in-court conciliation ... This is a free country. ... I think it is very wrong, absolutely immoral, totally unethical and I'm not sure it is in any way helpful. We've had people who have been through that process who have found it so humiliating and degrading and upsetting that they are disinclined to ever meet again jointly.

In Greater London most of those who used family-therapy methods in mediation also used video cameras or mirrored windows; and had colleagues or consultants viewing the sessions to offer advice or opinions.[39] Thirty-three of the mediators independently and spontaneously complained about the intrusion and discomfort that the application of these methods made families feel. Here are several examples:[40]

> I have had a lot of complaints about one way mirrors and videos. People don't like them. I know there are advantages in terms of training, support of workers for each other, but on balance, I don't like it and I do not wish to put my clients through it either. (out-of-court mediator)

> I don't hold with videos and I don't hold with one way [telephone] links. I was interested to note that several of the parties I recommended to out-of-court conciliation would not go to [named out-of-court service]

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38 This mediator is referring to welfare approaches in general, not to the Milan school of family systems therapy in particular. Milan therapists tend to have a limited number of sessions with their clients. (See chapter 12 for further discussion)

39 See Appendix A-1, services 16 and 17. See also chapter 3.

40 For an interesting consumer study of clients' feelings about these and other methods currently being used in family therapy, see: D. Howe (1989). The complaints he uncovered from family-therapy clients were very similar to those the mediation practitioners offered to me.

> because they had heard adverse reports about the videos. I don't think people should be - It is their marriage, their choice and I don't think they should be subjected to being in a gold-fish bowl. (in-court conciliator)
>
> I wouldn't like it if I was the client. Who are these God like people watching me? This [our mediation service] is a place where people feel secure, where they feel they are not being judged. What does it do to you if there is somebody out there? You feel people are sitting in judgement. They are not relating to you, they are just watching you. (out-of-court mediator)

These practitioners thought families should be given more autonomy in the process. Most (53, 52.0%) of Greater London's mediators were opposed to the use of video cameras, mirrored windows, and viewing teams. They considered the methods intrusive and unwarranted. Another 29 (28.4%) did not express an opinion on the issue (15) or were ambivalent (14). The other 20 (19.6%), however, expressed a preference for these approaches. (The majority of practitioners [66, 69.5% of the mediators commenting] thought the best approach was to have two mediators working in the room with the disputants. Of these, 50, or 75.8%, said they thought it best to pair a male with a female mediator. Another 10 preferred to work alone.[41])

The reasons practitioners gave for approving of viewing teams and video cameras or mirrored windows were that the methods allowed the mediator to gather information for more accurate assessments of the family and that they enhanced the power of the mediator's interventions; for example:

> Even with two of you, you are limited in what you are seeing. With a team you can go out, get someone else's perceptions and go back. It revitalizes the whole thing if you get stuck. (out-of-court conciliator);
>
> [interview with two out-of-court conciliators] A: I think it is very powerful: having a message coming in from outside, the client thinks they must be worth something having all that professional input B: Yes, it is powerful having the team sending in messages and also you get many more ideas thrown into the arena. They [the members of the viewing team] are not so deeply into it and so can see the interactions going on. You can miss very vital things when you are inside the situation.

We might note here that these practitioners' views are not in accordance with those held

41 See also T. Fisher (1987): 365-382.

by the majority of Greater London's practitioners. Here we find the therapeutic practitioners emphasizing the importance of the mediators' professional power rather than the disputants' decision-making power. This view fits better with the therapeutic literature than the mediation literature.

Proponents of viewing teams in mediation also argued that such methods prevented the mediator working with the disputants from getting pulled into their dispute, for example:

> We always work in a team. It is quite dangerous to work with families alone because they are very skilled at drawing people in, getting people on their side. ... It is extremely difficult to remain impartial and uninvolved. So the task of the team is twofold: partly to keep an eye on the dynamics by being one step removed, by watching the interactions. The other is to keep the worker neutral: if they are forming alliances, to drag them back out. (out-of-court conciliator);

This phrases 'drawing people in' and 'pulled into the dispute' were common among the practitioners. Sometimes the mediators worried that the mediator would accept the disputants' understanding of the causes and parameters of their dispute, causing the mediator/therapist to lose his or her professional systemic view. These therapeutic mediators were asserting the expert professional's superior understanding. Other, non-therapeutic mediators, were simply talking about mediators avoiding loss of objectivity and neutrality.

Finally, proponents of mediation viewing teams argued that the methods could provide a good opportunity for critical self-evaluation and worker education and training:

> The mirror would have been an ideal - with an outside consultant and our own knowledge within out team - to look at various techniques and to check them out and explore them before we introduce the mirror to the clients. We also, the mirror would have allowed us to video our own work as well ... [so that we could] check out our fantasies, beliefs and anxieties about working with other people. (in-court conciliator)

> [*The following conciliator did not like the idea of subjecting disputants to videos but acknowledged the methods provided some possible educative value for the workers*] That is the problem with all these theories. I mean, we should be the ones under the glass case and the video ... for teaching.

> We are the ones who aren't doing it right ... You are the one who is doing the counselling or whatever so you're the one who needs to be poked at.

This argument was commonly put forward by those opposed to these methods as the only possible justification for their use. Two practitioners mentioned the possibility of using videos in a less intrusive way: to show the disputants their own sessions so they could watch the progress of their own interactions, rather than for assessment purposes.[42]

Those who were against the use of these methods in mediation argued that they were an unjustified intrusion into people's lives; for example:

> How can you talk about your personal life with two people watching you that you can't see? I think it is dreadful. (out-of-court mediator)

> I don't think it is proper. Everything should be out in the open so there are not hidden agendas, reports or assessments, so the parties are defining what is out there. (out-of-court conciliator)

> (interview with two in-court conciliators) A: That [a video camera with a viewing team] sounds horrible. B: I've never tried it. A: Horrible, yecch! B: It doesn't do much for privileged, informal, off the record conversation does it? A: Good grief! B: One of the things we try to do is to get parents to [understand] that secrets are destructive. Then if we say, "Do you mind, we are leaving the room to discuss something". It is ridiculous and if you are in that situation and you've got people behind a bloody mirror! They don't know if the people viewing are 6 or 600, male or female. It is the very antithesis of what we are trying to do.

They also argued that the methods were being forced on people who disliked them, for example:

> Oh I abhor that. I think it is like - I did that in counselling training and I felt like a voyeur. The people knew. They hated it, I hated it, everybody hated it. (out-of-court conciliator)

For a consumer evaluation to the same effect, see D. Howe (1989).[43] Mediators who opposed these methods also argued that the methods inhibited rather than promoted communication, a free flow of information, and disputant negotiations:

> If they are being videoed, that puts constraints on them. I don't agree that the camera in the corner recording everything you do makes for

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42 See also J. Lemmon (1985a): 76.

43 See also: M. Mashal, R. Feldman, and J. Sigal (1989).

> open dialogue. The armour goes up and that can't be, there is not good dialogue then. (in-court conciliator)

There is some research support for this position.[44] Opponents also argued that in any event the methods were not even helpful:

> That is throwing the baby out with the bath water stuff. It doesn't address what we are supposed to be doing as divorce court welfare officers. ... Milan concerns me greatly and I wonder, I seriously wonder, if it just doesn't make it more fun for the worker. ... I think it is for the benefit of the workers and not for the clients. What we are looking at is loss, grief, mourning, ... it isn't about fun and games with videos and things like that. . Paradoxing is unethical, immoral, and usually done badly. [45] It is becoming famous in social work ... [The head of one of Greater London's out of court services] would say they have such a great success rate. I don't know what he means. (*That the clients don't come back for more help.*) No, because we get them. (in-court conciliator)

> I think they [the people who use video cameras and viewing teams] are putting themselves in a situation where a lot of very hurt and astounded people are walking into their office and not knowing what to say. ... They [the workers] have decided what they are doing is right and so aren't prepared to look further. I bet you a pound to a penny if you went back to some of their clients eight weeks later and asked, "what did you think?", they'd be so bloody angry: "I'm not going down to that place again!". I don't think people take it on board. They just go away hurt and angry. (in-court conciliator)

The practitioners who were opposed to these methods tended to emphasize the importance of the disputants' rather than the 'expert professional's' point of view. The former is more in line with the majority practitioner view of the mediation process. For further arguments and a discussion of some of the other problems of included therapy in mediation see M. Roberts (1990a).

Arguably one can provide family therapy without video cameras and viewing teams, but whatever form of therapy and therapeutic methods one applies it is very difficult, if not impossible, to reconcile the third party's expert status and the expert's goal of long-term therapeutic family or disputant change with that of disputant autonomy.[46] In chapter 5 we saw that mediators who emphasized professional expertise

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44 See: C. Clulow and C. Vincent (1987) 154; W. Maggiolo (1985) 135.

45 Even the family therapists warn that the use of paradox is inappropriate when people are in periods of crisis: M. D. Stanton (1981): 377.

46 Although Milan therapists do not accept responsibility for change, they do refuse to accept the family's view of its' own problems and offer instead a reinterpretation based on their own 'expert'

tended to be more directive in outlook. The practitioners who were opposed to the inclusion of therapy in mediation were deeply concerned about this conflict:

> My training is all therapeutic but they [the disputants] have the right to have a choice ... I don't think you should use divorce to try to impose some sort of correction. Damn that! People have a right to divorce. You can't make the assumption all children are going to be damaged and it is this whole thing about someone else knows best. (out-of-court mediator)

> It is important to understand your role. It is the clarity thing. It is not about being a judge or a therapist or a counsellor or a family practitioner. You are a mediator ... It is not about the expert or guru imposing decisions. ... The very skill is enabling people to discover answers for themselves. (out-of-court conciliator)

The most important thing to recognize here is that therapy and therapeutic methods can be every bit as directive, and sometimes a lot more intrusive, than rule-bound dispute-resolution processes, even those used in the adversarial process. Therapy in mediation is directive because it forces the disputants to discuss or accept 'expert' comment on aspects of their relationships or their families which lie beyond or underneath the assistance they have sought; also because therapists compel acceptance of their own views of the problems the disputants face.[47] This, of course, is not a problem if the family wants expert help with underlying problems and has sought family therapy for this purpose. It is a problem, however, if the family has accepted only an offer to provide mediation services. In these circumstances, even if consent to therapeutic methods is sought during the course of or at the beginning of the mediation sessions, the voluntary nature of the consent is problematic. One conciliator expressed the problem as follows:

> People would have to be asked and agree to it. But I think it would be very hard for them to say no; particularly the British, who never say no.

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understanding of the family's interactions. For some of the authors who have argued that you cannot reconcile the therapist's superior expert status with disputant autonomy, see: G. Davis (1988a): 58; G. Davis and M. Roberts (1988): 8-9; J. Fargo (1986): 3; J. Folberg (1984): 193; A. James (1987): 355; A. Milne (1985a): 3-13; M. Roberts (1988): 11-19, (1990a): 6; S. Roberts (1986): 25-38.

47 See, for example: G. Barnes (1984): 112; R. Becvar, D. Becvar and A. Bender (1982): 389; D. Campbell, P. Reder, R. Draper and D. Pollard (1983): 11-12, 25; G. Cecchin (1987): 412; C. Clulow and C. Vincent (1987): 181; H. Gadlin and P. Ouellette (1987): 412; D. Howe (1989); L. MacKinnon (1984): 103; J. Mayer and N. Timms (1970); G. Sargent and B. Moss (1986/1987): 94-95.

> So they wouldn't really be given much of a chance. ... People would perhaps not like it and yet feel unable to say, and that is the problem I see with it. (out-of-court conciliator)

Surely we must question the ethics of involving people in one process when they have contracted for another.[48] This is particularly true in the case of therapy because, as several of Greater London's practitioners pointed out, the process is not without its dangers:

> I'm not adverse to the therapeutic approach but I think there are dangers attached to that and unless both parents know. One of the things that worries me is the lack of informed consent. (out-of-court mediator)

> If I can come back to [the resolution of] conflict. We have to be very careful about what we are going to put in its place if we take it away. Just to take it away because we don't think people should have tensions is not right. You and I may not want tensions but some people do. Some people suffer from stress, some enjoy it. [Before you change it] You must first decide what you put in that place. (out-of-court mediator)

> Ideally therapeutic [mediation] would be lovely but practically it wouldn't work, because some people can't cope with looking so deeply, because it takes all their time to survive. ... If you take away how they are coping every day, then what are you doing to them? I just don't think everybody can cope with that. There is also the possibility of damage. (in-court conciliator) [49]

The dangers of therapy mentioned by the practitioners are not inconsequential. Therapy research indicates that the problems of a sizeable minority of the people who enter family therapy become worse during the course of treatment rather than better.[50] Disputants would have to be made aware of these dangers if they were to give informed consent to the process. Many of the professional codes for mediators including, for example, those developed by the Association of Family and Conciliation Courts, the American Bar Association, and Family Mediation Canada, impose an ethical duty on

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48 See also: E. Brown (1988): 140; N. Fricker, T. Fisher, and G. Davis, (1989): 257; J. Kelly (1983): 40; A. Milne (1985b): 73, (1985a): 1; L. Parkinson (1986a): 75-76; M. Roberts (1988): 77, (1990a); C. Schneider (1985): 92.

49 See also K. Kressel and F. Butler-DeFreitas (1989). The study found that those who needed therapy were resistant to it, and that the remainder wanted dispute resolution.

50 See, for example: V. Cline, S. Jackson, N Klein, J. Mijia and C. Turner (1987): 263; J. Fischer and H. J. Eysenck (1976): 98, 106, 109; A. Gurman (1985): 136; A. Gurman and D. Kniskern (1981a): 748; D. Hooper (1985): 292; D. Howe (1989); J. Sacks, P. Bradley, D. Beck (1970): 4, 18, 44; E. Sainsbury, S. Nixon and D. Phillips (1982): 24; T. M. Tomlinson (1967): 54; S. Walrond-Skinner and D. Watson (1987).

mediators to distinguish for clients the differences between mediation and therapy. The National Family Conciliation Council's *Code of Practice for Family Conciliation Services* (September 1986) was silent on the issue.

It is particularly dangerous to include therapeutic processes in mediation or in other processes that are connected to the courts, sanctioned by the courts, or otherwise not entirely voluntary.[51] M. Finer and O. R. McGregor[52] warned years ago that the combination of therapy and court processes would risk removing disputants from the arena of justice and would involve an overestimation of the capabilities of the behavioral sciences. We know from the Newcastle Report that disputants interpret court endorsement of mediation not only as pressure to enter the process and to reach agreement, but also as criticism of themselves for attempting to submit their dispute to the judicial process.[53] It is likely that court endorsement of therapeutic processes would be interpreted in a similar manner. For these and other reasons, some of Greater London's mediators expressed concern about denial of access to the judicial system and about connections between the courts and therapy. They argued:

> Without lawyers, judges, and courts, mediation looses its validity ... because at some point it is necessary to have available a judge. It is not the ideal but for some it is necessary, for deep psychological reasons, whatever. You are starting off with a value judgement which is that agreement between people is better, but if there isn't that freedom to choose between the two processes, mediation can become as arbitrary as sometimes the legal process can be. (out-of-court conciliator)
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> (The following quotation first appeared in chapter 4. It warrants repetition here) The danger is, and this has been shown in social work, if you reduce the importance of things like rules of evidence, you are diminishing the role of law which is the keystone of any democratic society: the right of access to the courts. And if you say courts aren't appropriate - it is all very well to say it is inappropriate but if you take it away you may find what you are left with is inappropriate. The rights of the child, for example - in social work we are now inclined to say the rights of the child are paramount and so act on things you couldn't perhaps establish in a court of law. And if there is no court, then the

51 H. Finer and O. R. McGreggor; H. McIsaac (1983): 54-55; M. Roberts (1990a); E Szwed (1984).

52 Obligation To Maintain.

53 (1989): 322-326.

> injured parent has no recourse to a court of law. We are into the business of how power should be exercised and I am against any Star Chamber. In [our form of] conciliation it is your freedom to come as you wish. (out-of-court mediator)
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> [The disputants have] come for a problem. And all these strategic messages and paradoxes ... Paradox is immoral in my opinion ... It is untenable. If they were a voluntary therapeutic organization, if they were a Milan clinic, then fine but they are part of the court welfare service and they have a responsibility to the clients, to the courts, and to the judges. ... It is playing a game with people's minds and I think it is not on. (in-court conciliator)
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> [Interview with two in-court conciliators] A: The strategic message is a useful therapy and that is wonderful but for people who come and say, "help, we want you to help us; do something". But it worries me that it is being inflicted on people in a divorce court setting when B: and if they don't do it they are seen as being difficult A: and they can't find any way out and around it ... and [the workers are] practising it on people who didn't come for family therapy, who've come because the court says they have to and they are in a fragile emotional condition anyway. They are not getting a good service at best. At worst it [the process] will damage them.

The adversarial process has often been criticized for being superficial and for not resolving the underlying roots of families' problems. Perhaps this is as it should be. How are we to justify the extent of state intrusion into family life evidenced here?[54] No one objects to family therapy if it has been sought voluntarily after a full explanation of the methods used and the possible dangers. The problem arises when therapy is imposed directly or indirectly by court order[55] or when it is appended to other processes without the consent, freely given, of fully-informed disputants.

Therapeutic methods are intrusive for good therapeutic reasons. The therapist is working at a deeper level than are most mediators. Mediation requires the family to discuss its own affairs to the extent needed to resolve practical matters such as: where the children will live, and if and how they will move between households; how the responsibility for decisions concerning the children will be shared or split between the

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54 R. Abel (1982): 268-283; Levy (1985): 495.

55 In Greater London, therapy by court order was most likely to arise indirectly: for example, when the court granted an order for an adjournment to enable the disputants to engage in mediation and directs the disputants to a service that is therapeutic; or when the court ordered a court welfare report and the court-welfare service or social workers to whom the report was directed routinely engaged in therapy as part of their court-welfare investigation process.

adults; who will pay what for the children's care; what rules will be needed by family members to enable them to reduce or manage their conflict while the family evolves into a new form(s). The therapist is concerned about the deeper issues such as: the improvement of the inner workings of the family and of the quality of the members' relationships and interactions with one another and with the world outside; the transformation of interpersonal family relationships into new ones thought to be needed after the separation; and the alleviation of personal and interpersonal emotional or psychological troubles. This means that therapists must probe and explore these issues. If we were to add therapeutic goals to the mediation process we would need to include this depth of probing.

Family therapists work with the small minority of families who have had particularly difficult problems. The methods they have developed have been designed to meet the needs of those families. Most families going through divorce or family reorganization are responding normally to the stress and crisis of family reorganization. Most divorcing families and their members are not at risk of long term psychological or interpersonal damage.[56] It is unlikely, therefore, that the two groups of families will have the same needs and thus respond favorably to the same methods. Crisis and conflict are ordinary human events.[57] Several therapists have suggested that therapeutic intervention during periods when families and their members are responding normally to the stress and crisis of divorce is both unnecessary and dangerous.[58] Perhaps, as E. M. Hetherington suggests,[59] the best approach to use in times of crisis, even if one is seeking a therapeutic goal, is a straightforward problem-solving, task-centered approach rather than a therapeutic one.

There are valid reasons why mediators in England, particularly those working

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56 B. Bloom, S. White and S. Asher (1979); R. Emery (1988).
57 L. Coser (1956); J. Laue (1987): 17.
58 R. Becvar, D. Becvar and A. Bender (1982): 385; H. Johnson (1986): 304.
59 (1984): 22.

in close proximity to the courts, might have wished to offer therapy to their clients during the mediation process. The first is that dispute/conflict resolution might leave unredressed underlying problems and conflicts; for example:

> [We prefer the] therapeutic [approach] in a way, because dispute resolution leaves too many anxieties undealt with and it doesn't help people to go on. (two out-of-court conciliators)

> I think a certain degree of therapy must come into it in a sense, because unless the emotional issues which are getting in the way of people agreeing are dealt with, I don't see how people are going to reach agreements which are going to last. There is a lot of underlying conflict going on. (out-of-court conciliator)

The second is that if therapeutic help is not given in the process, it might not be sought or made available to disputants elsewhere:

> Even if you said to someone, "You really need counselling or therapy before you can engage in mediation", people would be very reluctant to do it. So perhaps the mediator has to do a little bit of both for that reason. (out-of-court conciliator)

We know that only a small percentage of disputants submit their disputes to the courts.[60] One might conclude, therefore, that those who do so are more in need of help than those who do not. It is understandable and in fact commendable that court workers and mediators should wish to assist their clients with their deepest problems. There is no question that some members of the divorcing public have needs that are too deep for dispute resolution to redress. Yet still we must ask if court welfare enquiries and mediation are the best forums in which to address those needs, and indeed whether or not our current state of knowledge enables us to provide that kind of help.

It is to be expected that many of those who appear before mediators will have emotional and relationship difficulties in addition to their conflicts and substantive disagreements. Family and spousal relationships are the most important, intense and intimate human relationships most of us experience in our lifetimes. Anger, stress, despair, and difficulty adjusting to new roles and new family structures are normal

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60 For references and further discussion, see Chapter 9.

responses to the massive upheavals that people experience when their families and spousal relationships are disrupted.[61] Hence the need for mediators to empathize and to understand, to listen, and to acknowledge these problems. We know from the mediation research literature that this aspect of mediation is important to disputants.[62] But should the mediator attempt to resolve or change these deeper problems? As we have seen, Greater London's mediators were divided on this issue: most thought not; some thought some assistance in addition to simple dispute resolution was needed; a few sought to include therapy in mediation. A look at some of the research literature may help us to resolve the matter.

If mediation is to have a therapeutic goal and is to include therapeutic processes, it must first overcome a few obstacles. The first, the literature tells us, is that there is a lack of substantive knowledge within the behavioral sciences.[63] No one knows with any degree of certainty how to cure or take away these deeper problems. All we have now is a multitude of theories and methods which have little in common[64] other than a lack of research verification for their claims.[65] This is particularly true in

61 P. Bohannan (1971); J. Bowlby (1971); E. M. Hetherington (1984): E. M. Hetherington, M. Cox and R. Cox (1976) (1982); J. Wallerstein and J. Kelly (1980), (1986); R. Weiss (1975), (1979).

62 See, for example: J. Hiltrop (1989); J. Pearson and N. Thoennes (1984a); D. Pruitt, N. McGillicuddy, G. Welton, W. Fry (1989). See also: J. Fisher (1976): 149 and J. Mayer and N. Timms (1970); S. Rees and A. Wallace (1982): 23-25; for the importance of empathy, warmth, and listening in social work generally.

63 R. Becvar, D. Becvar and A. Bender (1982): 385; H. Finer and O. R. McGregor: 461; R. Mnookin and L. Kornhauser (1979): 950; A. Sutton (1981) (1983); N. Tutt (1983) 195.

64 See footnote 17.

65 I. Falloon: 101-126; J. Fischer and H. J. Eysenck (1976); D. Hooper (1985): 281-294; H. Johnson (1986): 301-304; P. O'Reilly and E. Street (1988): 162; A. Vetere (1988): 347. See also the following authors who report that family therapy has been able only to achieve poor to mediocre results: W. Boehm (1972): 212; V. Cline, S. Jackson, N. Klein, J. Mijia, and C. Turner (1987): 255; J. Fischer and H. J. Eysenck (1976); D. Hooper (1985): 275; H. Johnson (1986); J. Mayer and N. Timms (1970); E. Mullen and J. Dumpson (1972); J. Sacks, P. Bradley, D. Beck (1970); E. Sainsbury, S. Nixon and D. Phillips (1982): 186; B. Sheldon (1982): 6, 13, 240, (1986): 223; J. B. Turner (1972): 141; W. Walker (1972): 101-107. The studies that have shown family therapy to have been moderately helpful have been poorly designed and are largely without control group comparisons; or the therapies were directed to problems occurring within intact families. The successful therapists were usually using behavioral modification or communication techniques: H. Aponte and J. Van Deusen (1981): 310; C. Barton and J. Alexander (1981): 403; N. Epstein and D. Bishop (1981): 444; I. Falloon: 101; A. Gurman and D. Kniskern (1981): 742; H. Johnson (1986): 299; K. D. O'Leary and H. Turkewitz (1981): 159; D. Olsen (1984); A. Robin (1983): 721; C. Russell, D. Olson, D. Sprenkle and R. Atilano (1985): 77; M. D. Stanton (1981): 361; T. M. Thomilson (1967): 315; K.

the areas of divorce and separation.[66] We have no evidence to show that family therapy works, nor do we have research to tell us which of the family therapy theories or models to apply to any particular family.[67] When the problems disputants are having are normal responses to family reorganization, should we really be trying to change or alter them anyway?

The second problem we confront immediately is the fact that the available consumer research on social welfare methods suggests that most people would prefer an empathetic, dispute-resolution process to a therapeutic one.[68] The research literature tells us that processes that have the following attributes have been the most effective or most liked by clients: those that are time-limited;[69] those that focus on building communication skills;[70] those that are devoted to solving problems rather than producing therapeutic change;[71] those that are devoted to practical rather than insight-oriented help;[72] and those that require workers to accept their clients' understanding of their problems.[73] Most of these attributes describe a dispute-resolution, not a therapeutic process. The third problem arises from the consumer-evaluation literature. When we look at consumer evaluations of the conciliation and mediation processes we discover

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Wampler (1982): 345.

66 R. Emery (1988): 113; I. Falloon: 119; A. Gurman and D. Kniskern (1981): 750; D. Hooper (1985): 283; H. Johnson (1986): 299; K. Kressel (1985): 122; J. Mayer and N. Timms (1970); P. O'Reilly and E. Street (1988): 162.

67 D. Hooper (1985): 294; H. Johnson (1988): 301.

68 See, for example K. Kressel and F. Butler-DeFreitas (1989); and the studies cited in footnotes 69 to 73.

69 A. Fortune (1985): 91; E. Mullen and J. Dumpson (1972): 13; R. O'Connor and W. Reid (1986): 596; W. Reid and A. Shyne (1969): 189; E. Sainsbury, S. Nixon and D. Phillips (1982): 186.

70 A. Gurman and D. Kniskern (1981): 749; K. D. O'Leary and H. Turkewitz (1981): 159; D. Olsen (1984): 676; S. Rees and A. Wallace (1982); T. M. Tomlinson (1967): 315; K. Wampler (1982): 350-352.

71 E. Mullen and J. Dumpson (1972): 13; S. Rees and A. Wallace (1982): 33; W. Reid and A. Shyne (1969): 100.

72 E. M. Goldberg and R. W. Warburton (1979): 13-14, 124-125; M. Murch (1980): 35; S. Rees and A. Wallace (1982): 33; E. Sainsbury, S. Nixon and D. Phillips (1982): 16, 19; P. R. Silverman (1970): 625.

73 C. Clulow and C. Vincent (1987): 98, 181; A. Fortune (1985): 91; D. Howe (1989): 98-109; J. Mayer and N. Timms (1970): 14-66; H. Perlman (1970): 198; S. Rees and A. Wallace (1982): 59; E. Sainsbury, S. Nixon and D. Phillips (1982): 19; B Sheldon (1982): 236.

results that are, for the most part, favourable.[74] The effectiveness of mediation is fairly well documented in the consumer research.[75] The therapeutic forms of divorce intervention are not.[76] If family therapy is added to the mediation, will mediation's consumers suffer in consequence?

This does not mean that family therapy is never helpful. The fact that family therapy's research results have been disappointing does not mean it fails to be of assistance to everyone. Indeed, the research tells us that some people have found

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74 Most of the research on mediation/conciliation indicates that disputants like the process. See, for example (omitting self-evaluations): S. J. Bahr, C. B. Chappell, A. Marcos (1987): 37; B. Bautz and R. Hill (1989): 33, (1991): 206; A. E. Cauble, N. Thoennes and J. Pearson (1985): 32-33; G. Davis and M. Roberts (1988); Department of Justice (Canada) (1988); K. Dunlop, (1984): 71; R. Emery and M. Wyer (1987): 179; R. Emery and J. Jackson (1989): 3; H. H. Irving and M. Benjamin (1983): 65, (1984): 277-278; H. Irving, M. Benjamin, P. Bohm and G. Macdonald (1981): 41; J. Kelly (1989): 71; J Kelly, L. Gigy and S. Hausman (1988): 453; K. Kressel, F. Butler-DeFreitas, S. Forlenza and C. Wilcox (1989): 55; M. Little, N. Thoennes, J. Pearson and R. Appleford, (1985): 10; E. Lyon, N. Thoennes, J. Pearson and R. Appleford, (1985): 22-23; Newcastle Report (1988); J. Pearson and N. Thoennes (1984a): 32, (1984b), (1984d): 514; (1985a): 465-466, (1988b): 429, (1988a): 71, (1989): 9; K. Salzer (1987); D. Saposnek, J. Hamburg, C. Delano and H. Michaelsen, (1984): 7; J. Waldron, C. Roth, P. Fair, E. Mann, J. McDermott Jr., (1984): 5; but see: E. A. Lind and R. Maccoun et. al. (1990): 952-89. While there are problems with much of this research when attempts are made to mediation to the bilateral negotiations conducted by lawyers or to the adversarial process as a whole; [see for example: K. Kressel (1987) and R. Levy, 'Comment': 525. As K. Kressel and R. Levy have pointed out, some of the positive conclusions drawn from these studies are questionable because many of the differences found by researchers between mediation clients and those who had been through the adversarial process can be explained by other differences in the characteristics of the two groups. Furthermore, it must be remembered that most of the researchers have been comparing client endorsement of a free service to one which can cost a great deal. With the exception of cost complaints, the research tells us that between 60 to 93% of clients are satisfied with the services they receive from their lawyers and the courts, see chapter 9 and also, for example: G. Davis (1988a), E. A. Lind and R. Maccoun et. al (1990): 952-89. This is as high and sometimes higher than are consumer rankings of satisfaction with the services of mediators. For consumer rankings of the helpfulness of lawyers, see, for example: A. E. Cauble, R. Appleford, N. Thoennes, J. Pearson, (1985): 32; Committee on The Future of the Legal Profession, (1988): 47, 52; J. Kelly (1989): 80; K. Kressel (1987): 219-220; A. Mitchell, (1981): 34; M. Murch (1980): 14, 16, 31; J. Pearson and N. Thoennes (1988a): 78; Newcastle Report (1988): 270, 275; D. Saposnek, J. Hamburg, et. al., (1984): 12. But see also, for example: G. Davis (1988b): 97; R. Cavenaugh and D, Rhode, (1976): 103; H. Erlanger, F. Chambliss, and M. Melli, (1987): 585. Satisfaction with the 'adversarial' system as a process appears to be lower than is consumer satisfaction with lawyers, i.e.: K. Gersick, (1974): 306; J. Pearson and N. Thoennes, 'Longitudinal': 514, (1988b): 437; G. Spanier and R. Casto, 'Adjustment' (1979): 215, but see: E. A. Lind and R. Maccoun (1990): 952-89.] The research does establish fairly clearly that many people like mediation as a process and that the process achieves some of the goals it seeks. For some exceptions to positive results in mediation, see: G. Davis (1988): 95; G. Davis and K. Bader, (1983a), (1983b,c,d), (1985a,b); H. Irving and M. Benjamin (the private mediation service) (1988): 44; Newcastle Report, services in category A (1988); J. Pearson and N. Thoennes, the Connecticut service, (1988): 71; J. Pearson and N. Thoennes, the Delaware study (1989): 18, 20-21.

75 See footnote 74 above.

76 D. Sprenkle and C. Storm (1985): 209. See also footnotes 65, 66, 67, 69, 70, 71, 72, and 73.

various forms of therapy helpful for some problems. It appears rather that far greater care should be taken to identify those who need therapy and to ensure that they are referred to the most appropriate form of therapy. The research also indicates that it is unlikely that any one family therapy model is appropriate for use with the whole of the divorcing public.[77] If mediation is a process that is being developed to serve the needs of the majority, therapeutic interventions are best developed elsewhere. If mediation moves to a therapeutic focus this is likely to affect referrals from the legal profession. Those needing therapy will be referred to mediation, and the lawyers will continue to handle the rest. Mediation will have accomplished little. Perhaps, as many have suggested, therapy will cloud rather than enhance the process.[78]

The exclusion of family therapy from mediation does not mean that disputants should not be permitted to talk about their emotional and relationship problems during the mediation process, but what the majority of people probably need is a clear focus and empathy and understanding rather than attempts at therapeutic change. The mediation research literature does not offer much guidance on this issue.[79] The research concerning the degree to which disputants wish to discuss, and the degree to which it is helpful to discuss, past marital problems in mediation sessions is not clear: some disputants appear to appreciate limits, others are critical of them.[80] We have very little research concerning the advisability of weighting the focus of discussions in mediation in favour of emotional, inter-personal or family-relationship issues rather than in favour of conflict reduction and dispute resolution; or on the advisability of trying to change or resolve problems as opposed to offering rapport,[81] empathy and understanding. On the

77 H. Johnson (1988): 301.

78 See also: S. Grebe (1985): 35; J. Kelly (1983): 39-40; L. Vanderkooi and J. Pearson (1983): 562.

79 The Newcastle Report was expected to provide guidance on this issue, but concentrated on the effects of connections between mediation and the courts instead.

80 Compare, for example: G. Davis and M. Roberts (1987): 83 and J. Pearson and N. Thoennes (1988): 76. See also: H. Irving and M. Benjamin (1987): 236.

81 It appears from the mediation literature that establishing rapport is important, particularly when hostility levels are high: P. Carnevale, R. Lim and M. McLaughlin (1989): 213; K. Slaikeu, J. Pearson

one hand it appears that disputants value a full discussion of the matters that concern them, including underlying issues, and appreciate having their emotional concerns heard and understood.[82] It also appears that they appreciate gaining a better understanding of their own, their spouse's, and their children's feelings during the process.[83] The studies of W. Donohue, et. al. suggest that it may be counterproductive to move disputants from relationship to practical or legal issues before the disputants are ready.[84] On the other hand, it also appears that it may be counterproductive to spend too much time making statements about or eliciting feelings[85] or attributing attitudes and feelings to others.[86] It also seems that disputants appreciate mediators who can maintain a clear focus on the matters in dispute. Consumers, it appears, do not want to be subjected to therapeutic processes as part of court processes or of mediation.[87] These results may appear to be contradictory. Perhaps disputants want to feel heard and understood but not treated or otherwise manipulated or changed by professionals. Perhaps disputant power, again, is at the root of the issue.[88] This would certainly accord with the bulk of the consumer

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and N. Thoennes (1988): 493; K. Slaikeu, R. Culler, J. Pearson and N. Thoennes (1985): 55.

82 J. Pearson and N. Thoennes (1988b): 435; D. Pruitt, N. McGillicuddy, G. Welton, W. Fry (1989): 388.

83 J. Pearson and N. Thoennes, (1988b): 435.

84 W. Donohue (1989): 341; W. Donahue and D. Weider-Hatfield (1988): 297; W. Donohue, J. Lyles and R. Rogan (1989): 24-26. Caution is recommended here. The fact that mediation is not as successful when disputants feel they had been moved from relationship to substantive issues before they are ready, may tell us as much about the type of disputants who are not successful in mediation as about effective mediator behaviour. Perhaps disputants who need an exhaustive exploration of their feelings or relationships are not good candidates for mediation. Donohue, Lyles and Rogan do note (24-25) that couples who focus on relationship issues have more difficulty reaching agreement.

85 S. Rogers and C. Francy (1988): 39 (no effect); K. Slaikeu, J. Pearson and N. Thoennes (1988): 475; K. Slaikeu, R. Culler, J. Pearson and N. Thoennes (1985): 55.

86 J. Pearson and N. Thoennes, (1989): 25; K. Slaikeu, J. Pearson and N. Thoennes (1988): 475; K. Slaikeu, R. Culler, J. Pearson and N. Thoennes (1985): 55.

87 C. Clulow and C. Vincent (1987); K. Kressel, F. Butler-DeFreitas, S. Forlenza and C. Wilcox (1989): 55; M. Murch (1980): 35. See also: D. Howe (1989).

88 Having said this, there is also research to suggest that some consumers want to have their cases judged. Disputants tried to get court-welfare officers do this during some of the in-court conciliation cases observed. Eleven of the mediators (without solicitation) mentioned being pressured by clients to adjudicate, for example:

> Often the clients want you to wave the magic wand. They have a problem which they don't feel they can solve themselves and they come wanting you to push a button and tell them how to do it. They are sometimes

research on counselling and therapeutic services that we have been discussing. Again and again, those studies have shown that clients want practical help, not insight into relationships.

Perhaps the solution is to ensure that mediators are sufficiently well versed in the various therapeutic approaches so that they can offer information about available options to disputants who appear to need greater assistance. It is vitally important that mediators who are also therapists do not impose therapy on clients; that fully informed consent is first obtained;[89] that the decision to engage in therapy is made by the disputants and not by the therapist/mediator; and, as M. Roberts (1990) suggests, that those services using therapeutic methods make members of the public aware of the methods they are using so that disputants can choose between the various types of services available before they arrive at the door of any particular service. We shall discuss the depth of knowledge that the practitioners suggested mediators obtain from selected therapeutic subjects in Chapter 12.

Discussion and Summary

This completes our examination of the meaning of disputant autonomy for mediation practitioners. We have found the concept central to the practitioners' understandings of their own roles in the mediation process. In chapter 4 we found that it tempered the practitioners' understandings of mediation's other goals. In chapter 5 we saw that it shaped their understandings of their own responsibilities to their professions and to children. Here we examined the connections between disputant autonomy and procedural power. We found that it is an error to assume that all types of procedural power interfere equally with disputant autonomy and decision-making. Some types of

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disappointed if you can't do that. (out-of-court conciliator)

See also: Newcastle Report: 278-306 and E. A. Lind and R. Maccoun et. al. (1990): 952-89. Perhaps people want the right to make their own decisions or they want direction on practical as opposed to psychological or relationship issues.

89 If the client of the family therapist is the family, does this mean the family therapist ought to obtain a consent to treatment from each family member? See: D. Haldane (1987): 145.

procedural limitation and control appeared as likely to enhance as to limit the ability of disputants to make their own decisions. The majority of the practitioners approved of mediators assuming power when that power enhanced that of the disputants; they were critical of mediators assuming power when it enhanced the professional's power at the expense of the disputants'.

It was for this reason, and because of mediator concerns about unjustified professional intrusions into family life, that most Greater London mediators opposed the use of therapy in mediation. Disputant autonomy meant more to the practitioners than disputant decision-making; it also included an element of freedom from professional intrusion. The practitioners' views on therapy in mediation are in accordance with the mediation and family-therapy literature and consumer research. The mediators who supported therapy held views that had more in common with the therapeutic than with the mediation literature. Consumer research corroborates the benefits of mediation but not the benefits of family therapy for the mainstream of the divorcing public.

We shall find that the practitioners' emphasis on disputant autonomy and their lack of emphasis on the importance of therapy in mediation will have a profound effect on the education and training they will propose in chapters 11 to 13. In accordance with the practitioner views reflected here, we shall find that few of the mediators believed mediators need therapeutic knowledge, and that most gave priority to mediators learning how to process the resolution of disputes and conflicts. We shall explore the practitioners' perspectives on the importance of these subjects in chapters 11 to 12. Before we can do so, we need to add to our understanding of the mediation process developed here and in chapters 4 and 5, an appreciation of the types of substantive issues to be addressed. We know how the process should work; we need to know what it will encompass. In chapter 7, therefore, we turn to a discussion of mediator practices and points of view with respect to mediation of property and financial issues.

CHAPTER 7

Greater London's Mediators Contemplate The Mediation of Financial and Property Issues

Introduction

In chapters 4, 5 and 6 we explored with Greater London's mediation practitioners the goals and parameters of the mediation process. We discovered the importance of disputant autonomy and looked at some of the ways it affected mediation's other attributes and the role of the mediator. These discussions gave us an appreciation of the practitioners' understandings of what the mediation process is. During our discussions we noted the importance of mediators giving information, not advice, and the increasing difficulty that mediators could expect to have maintaining disputant autonomy as they moved from the mediation of child issues, where the disputing parents have some expertise, into property and financial mediation. Here we shall examine the practitioners' practices of and attitudes towards mediation of financial and property issues. We move from an examination of how the mediation process works to an examination of what it works on: the subject matter of mediation.

Generally, we shall find that the practitioners, family lawyers as well as mediators, were in favour of the growth of global mediation but concerned about the education and training needed to provide it. The practising mediators agreed with the family lawyers that mediators, as a group, did not have the education and training required. These views are in accordance with the information that we have about the education and training backgrounds of the practitioners.[1] The mediators were divided

1 This is assuming that substantive knowledge is required. For further discussion see chapter 2.

in their opinions about the most appropriate solution. Some wanted to work with lawyers or to leave financial and property mediation to the lawyers; others wanted to see the development of education and training programmes to upgrade the training of existing mediation practitioners.

In chapters 2 and 3 and Appendix A-1 we saw that very few (9) of Greater London's mediators were lawyers[2] and that very few worked in mediation services regularly offering mediation of property and financial issues. Here we shall find that the mediators' participation or lack of participation in global mediation varied within the services. The majority limited mediation to child issues, but the practice of global mediation was beginning to grow. That growth has continued.[3]

Despite the practitioners' lack experience with and training in global mediation, a number of circumstances made it important to explore financial and property mediation with the practitioners. First, it appeared likely that lawyers in England would follow the same pattern as lawyers elsewhere and begin to offer mediation services. (This has now happened under the auspices of the Family Mediators' Association, the FMA.[4]) Second, it seemed likely that mediation would grow to encompass financial and property issues and it seemed useful to explore whether or not the existing services were beginning to expand in this direction. Third, and most important, it was not possible to fully explore professional, educational, and training issues without addressing and distinguishing between the qualifications needed to practice mediation of child issues and those needed to practice mediation of property and financial issues (global mediation). Now that the *Newcastle Report* has recommended that existing mediation services provide global mediation,[5] and now that

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2 I continue to include barristers, solicitors and attorneys whenever the context requires when I use this term. In this case I am also including one legal executive (para-legal).

3 The National Family Conciliation Councils' (NFCC) (1990): 9 refers to Rountree monitoring five experimental comprehensive mediation models. See also: M. Richards (1990): 436-8.

4 See chapter 3 and Appendix A-1, service 11 for some background information.

5 (1989): 358.

the mediation services have accordingly moved in that direction,[6] it has become even more important to explore the professional problems connected to this development.

Before we begin our examination of the global mediation practices and opinions of Greater London's mediators in detail, let us first examine some of the mediators' practices and opinions in tabular form:

TABLE 7-1
Mediator Practices [7]

	Number	Percentage	Lawyers[8]
Mediation of child and inter-personal conflicts only:	53	52.0%	3
Financial and property mediation in principal only:	18	17.6%	0
Full mediation of maintenance and marital home if mixed with child issues:	13	12.7%	1
Full range of global mediation services, at least occasionally:	18	17.6%	5[9]

TABLE 7-2
Should Financial and Property Mediation Be Available to the Public?

	Number	Percentage
Yes:	68	66.7%
No:	26	25.5%
On maintenance issues only:	2	2.0%
No answer or ambivalent:	6	5.9%

6 NFCC (1990); M. Richards (1990): 427.

7 The practitioners were categorized in accordance with their responses throughout the interview. Thus a mediator who maintained that he or she only mediated child issues, was categorized in the appropriate global mediation category if during the course of the interview he or she gave examples of cases he or she had mediated which included mediation of financial and/or property disputes.

8 Lawyers and para legals.

9 A sixth practitioner always worked with lawyer when mediating property or financial issues.

TABLE 7-3
Can lawyers be trained to do mediation?

	Number	Percentage
Some[10] lawyers are trainable:	73	71.6%
Lawyers cannot be trained to do mediation:	8	7.8%
Non committal:	21	20.6%

TABLE 7-4
Preferred Model of Global Mediation Practice[11]

	Number	Percentage
Co-working or collaborating with family lawyers:	36	35.3%
Global mediation by existing mediators without lawyers:	22	21.6%
Mediated should be limited to child issues:	26	25.5%
No Answer or Preferences unclear:	18	17.6%

Global Mediation Practices In Greater London: 1987 - 1988

If we are to gain a true appreciation of the global mediation experiences of the practitioners, we must look at the variation in mediator practice reflected in Table 7-1 in more detail. With the exception of the eleven members of services 6 and 11, the mediators in Greater London, almost without exception, initially maintained that they mediated only child issues. Yet, during the course of the interviews, the practitioners commonly cited case examples that clearly involved determining the quantum of maintenance, or the disposal and division of the proceeds of the marital home.[12] Other examples of financial and property disputes occasionally mentioned, although far less frequently, involved the division of pensions, family businesses, trust funds, bank accounts, and liabilities. As we see in Appendix A-1, the only services regularly providing global mediation on a range of property and financial matters were services 6 and 11. Services 14 and 17 offered property and financial mediation occasionally. As a

10 Many of these mediators added conditions. Usually these concerned the need for the lawyer/trainee to have certain personal characteristics. We shall discuss the personal characteristics needed by mediators in chapter 8.

11 If mediators proposed a number of models, only the first choice has been included.

12 See footnote 7. All services were told at the beginning of the study that I was a lawyer. This may have caused practitioners to be reluctant to admit financial and property mediation practices.

general rule[13] in-court practitioners limited mediation to disputes over children. Practices within the other services (with the exception of Service 8[14]) appeared to vary by individual practitioner.[15] Some practitioners said they were prepared to get involved in financial and property mediation at least to a limited extent; others said they were not.

As we see in Table 7-1, the majority of the mediation practitioners in Greater London limited the mediation that they provided to interpersonal conflicts and disputes concerning children. Any discussions of property and financial matters were of a minor nature not requiring professional expertise. For example:

> Sometimes we get it where the person says, "I can't send the children to him, I haven't got the money". So probably it is a good idea to discuss finance at that level but if you start getting into deep maintenance - she wants 200.00 per month for each child, then I don't think that is the conciliator's job. (out-of-court conciliator)

If other financial and property matters during the course of the meetings, these mediators were not directly involved:

> I wouldn't want anything to do with property and all that. It would put me off the job completely. ... Sometimes parents try to talk about [property and finance] - usually you are just aware this is going on. ... They do talk about it and try to bring you into it but I find it quite easy to say, "That's not what I'm here for" and [to] sidestep it. (in-court conciliator)

> Sometimes when people find out it works for one thing, they go and try it out for another thing. [For example] the couple we had in here, who

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13 During the course of one of the in-court mediation cases, the registrar asked the court-welfare officer involved to mediate maintenance as well as custody and access. The case concerned me for a number of reasons. The woman appeared before the registrar with legal counsel. The man was unrepresented. The man had concerns about access to his children and was arguing that he should not have to pay maintenance for one of the woman's children because he was not the child's biological father. When the parties returned before the registrar after private deliberations with the court-welfare officer, it appeared that the wife's lawyer and the court-welfare officer had persuaded the man to agree to accept long-term financial responsibility for the maintenance of the child. The registrar granted the 'consent' order without further enquiry. The result may have been legally and morally correct if one knew the full facts of the case, but I felt the process to be balanced in favour of the wife. I also felt that, in the circumstances, before any order was made, the man should been offered the opportunity to discuss his position with an independent lawyer.

14 None of the practitioners in service #8, Appendix A-1, were prepared to offer financial or property mediation of even limited depth and scope.

15 For information about the practice of financial and property mediation throughout England and Wales, see: Newcastle Report: (1989): 94, 99.

> had worked out beautifully all the arrangements for the children and they wanted to continue on with maintenance, property, and all the rest of it. So we said, "Look, go back to another conciliation agency" and they went to [named out-of-court mediation service] to work out the money. We told them from the start that we couldn't do that and it was quite complicated really. They had lots of property and money. (in-court conciliator)

In Table 7-1 we see that other practitioners said they limited their participation in property and financial matters to mediation of principles, leaving final negotiations over quanta to the disputants' legal advisors or accountants. For example:

> We don't actually deal with the sums of money. I'm not a lawyer. ... But I certainly think you have to deal with it in principle because very often it is about money. ... Mediation or conciliation is about what is right for the people concerned. It is not about what is right for the court. The process is not about: "He is offering you this, and this. Can you manage on this?". It is about what people can cope with emotionally. ... So it is more about saying, "Look, she cannot live on that. These are the things she is going to have to do without." It is helpful to have a knowledge of what these things are about. I think pensions are so complicated. It is OK in principle but not to go into the detail. You need an accountant for that. ... [They] can agree in principle as to whether they want to split the pension but I would leave the nitty-gritty to the accountant. If money was in issue, I would want to know why it is in issue: what does it mean? I don't think the actual sums are really the issue ever. (out-of-court conciliator)

> I don't think we should dabble too much because it comes into the law, and rather than give wrong advice, it is better to say, "Look, that is something you had better sort out with your [solicitor]. I mean we do give advice, very loose advice about property, what we think will happen [in court]. ... (*Does maintenance come into it?*) Yes, because sometimes they come because the husband won't pay and then we try to sort out their income but we really do say that this is something - we really don't know the legal end. We try to work it out in general with an informal chat. (out-of-court conciliator)

Most of the practitioners in this group limited their participation in deliberations over financial and property matters to child and spousal maintenance issues and to disputes connected to the occupation and disposal of the marital home. A few were willing to become involved in a wider range of issues, but all members of the group said they did not get involved in the final negotiations.

The first mediator's comments are somewhat confusing. After saying that mediation is not about determining the financial resources needed to support each

family segment, and not about generating offers and acceptances, the speaker appears to recommend doing just that. It is important to remember that complicated legal issues are usually connected to matters of principle, for example, to determining whether or not certain assets are divisible and in what proportion, rather than to determinations about quanta. The mediator also appears to be assuming that financial stability and emotional well-being or mental health are not connected. This is almost certainly erroneous. Research suggests that large reductions in the financial resources of the family after separation and divorce contribute significantly to a reduction in the well-being of children and the custodial parent.[16]

Another group of mediators indicated that they fully mediated disputes over maintenance and the marital home if these were closely connected to disputes concerning the children. For example:

> We only touch it if we feel it is entwined with the problems about the children. I mean, sometimes you try to negotiate about the children but he or she says, "I don't want to talk about that because I want to talk about the house". We feel that financial matters are the province of solicitors. We don't - but if they are bound up - or if you have the children saying: "But father doesn't give mother any money" or father saying, "Every time I try to talk about seeing them -" You can't sleep, you've got to deal with it and settle those issues. So it is mainly custody and access and control of the children but sometimes we also get involved in the financial matters. (out-of-court conciliator)

The remaining practitioners were at least occasionally offering a full range of mediation services. Although the practice of global mediation was beginning to spread, with the exception of the six members of service 11 it was clear that all of the mediators in Greater London spent the vast majority of their time mediating disputes over the future care of children.

The variety of practice that is reflected in the responses should not be surprising. Early NFCC[17] guidelines for mediation services did not provide clear

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16 W. Hodges (1986): 32, 45-51, 54-56; A. Sev're and M. Pirie (1991): 329.

17 The National Family Conciliation Council (NFCC) is the English national association for mediation services not connected to the courts.

guidelines to affiliated services about their roles with respect to financial and property mediation in England. The guidelines specified that it was appropriate for affiliated services to mediate property and financial issues if those issues could not be separated from debates about the divorce itself and/or the children,[18] but almost all of the financial and property decisions families must make when they divorce or reorganize are arguably connected either to the divorce or to the children's well-being. NFCC attempted later to qualify these guidelines.[19] By September 1986 the code specified that services should not be involved in drafting settlements specifying the amount of maintenance, lump sum payments, or property transfers;[20] but even the September 1986 code left the mediators to answer many unanswered questions. Was it permissible to help disputants reach oral agreements on these matters? Should services mediate property and financial issues in cases where they had advised the disputants to seek legal advice, where the disputes had emotional overtones, and where the disputants did not wish to go to the expense of hiring lawyers? NFCC guidelines left the determination of the answers to these questions to the individual practitioners. The practitioners, as we see, had arrived at a variety of answers.

Legal Information and Advice: the Role of the Mediator

Before we turn to an examination of the practitioners' attitudes towards financial and property mediation, a few words about mediators and legal advice are in order. As we have seen, one mediator commented: 'I mean, we do give advice, very loose advice, about property, what we think will happen [in court].' This comment suggests that the mediator did not think it inappropriate to give legal advice. Similar comments were common. During the course of the interviews, twenty-four of the practitioners made comments indicating that they gave disputants information about what the courts were

18 (1984): 107.
19 NFCC (1986a): 2 (iv).
20 Ibid.

likely to do in their particular case. Only three of the twenty-four were lawyers. In chapter 4 we discussed the dangers of advising disputants and the importance of mediators protecting disputant decision-making when giving information. We encounter some additional problems when mediators give legal advice: the lack of mediator education and qualification to give such advice (see Chapter 2); potential mediator liability for erroneous advice; and potential complaints of unauthorized practice of law.[21] Legal training is required accurately to interpret court decisions and judicial pronouncements and to evaluate their applications to the facts of a particular case.[22] Without that training, a person is apt to interpret court decisions erroneously. In any event this is the role of the disputants' partisan lawyers, not that of the mediator, even when the mediator is a lawyer.[23] The fact that a substantial minority of the mediation practitioners appeared to be giving people legal advice is worrying, given their lack of qualification to do so, and given also the beginnings of the growth of global mediation. Agreements about the future care of children can be varied when changing circumstances warrant; agreements about the division of the family's finances and property usually cannot.[24]

The possibility that lawyers will give legal advice in mediation is regarded as one of the dangers of allowing lawyers entry into the field.[25] It is feared that lawyers will assume control over the process and will have the disputants comply with the views of the legal system and the courts, rather than allowing the disputants to create their own solutions. This study reveals that not only is this danger not exclusive to lawyers, but that the lawyer-mediators in Greater London appeared to be more cognizant of the

21 For further discussion of some of these potential problems, see: J. Folberg (1988): 341; G. Hufnagle (1989): 33; J. McCrory (1987): 144; L. Parkinson (1986a): 128; and P. Shaposnick (1987): 170 on liability; and C. Crockett, (1985): 109; G. Hufnagle (1989): 33; J. Pearson, M. Ring and A. Milne (1983): 21; L. Silberman (1988): 359 on the unauthorized practice of law.

22 See footnote 21.

23 N. Rogers and C. McEwen (1989): 25; J. Ryan (1986): 117-9.

24 See chapter 13.

25 For example: L. Gold (1988): 220; J. Wiseman and J. Fiske (1980): 443. We shall discuss the practitioners' views of lawyers as potential mediators in chapters 8 and 9.

danger than other practitioners. The lawyers commented:

> It is helpful [for mediators, dealing with child issues] to have the [legal] knowledge but [it is] not essential because you aren't giving advice. (out-of-court conciliator/lawyer)

> I see my role as trying to enable discussion of legal issues on a fairly informed basis. In other words I would explain that in considering financial needs the courts look at the needs and resources of the parties and I will explain what financial resources might include. ... So I would point out things in general terms but I would not be advising the wife, for example, that on the basis of the information disclosed by the husband, she should receive 5,000.00 per year or whatever. One would expect the parties to draw their own conclusions in that regard. We would also be quite careful not to steer them to our own view of outcome. (out-of-court mediator/lawyer)

> [*Would you need to establish the value of the company's shares?*] No. That is not for me to get involved in. That is a matter for the solicitors and their accountants. [*So your role is to send them out to get that information?*] That is right. ... And I'm not here as a mediator to choose between two different evaluations. ... They may have to go to a barrister, each of them. Do you see the problem? You've got to have boundaries because we are not adjudicators. This is not arbitration. (out-of-court mediator/lawyer)

> The role of the solicitor, the lawyer, [in mediation] is not that of the legal advisor. ... The role of the lawyer is as a neutral mediator using his legal background and that is a very different role. (out-of-court mediator/lawyer)

These lawyers were able to separate information from advice, and the role of the facilitator from that of the expert.

The number of lawyer mediators involved, however, does not allow us to conclude that this understanding is universal among family lawyers who wish to become mediators. We know from the research literature that lawyers are used to giving partisan advice and to assuming control over their clients affairs.[26] There are also indications that many family lawyers do not yet fully understand the non-directive nature of mediation.[27] As lawyers become more involved in global mediation,[28] therefore, it will be important to ensure that they understand these divisions and the

26 See chapter 9.

27 L. Neilson (1990).

28 Greater London's family lawyers have expressed a great deal of interest in mediation practice: L. Neilson (1990).

differences between their roles as lawyers and their roles as mediators. Some of the practising mediators might have benefited from similar training. When we examine the mediators' recommendations for the education and training of new mediators in chapter 11 we shall find strong endorsement of the need to include this topic in mediator-training programmes.

Practitioner Opinion: Is Financial and Property Mediation A Needed Service? Reasons and Prerequisites For Practice

Even though most of the practitioners did not offer full global mediation services to the public, the majority (sixty-eight: see Table 7-2) thought the service should be available. Fifty of the sixty-eight practitioners in favour of global mediation, however, spontaneously qualified that response.[29] They said that certain things would need to be done before global mediation services could be promoted. Many (thirty-six) said that practitioners would first need to receive a great deal more education and training. (Thirteen of the twenty-six practitioners who were opposed to global mediation gave this as one their reasons for their opposition.) Twenty-one, of the sixty-eight favourably disposed mediators said that only lawyers should provide the service or that mediators should only provide the service when co-mediating with a lawyer. (Twelve of the twenty-six mediators who opposed global mediation said they thought property and financial issues should be left with lawyers in the existing system; another two cautioned that if any such service were to be developed, lawyers would have to provide it.) Another eight of the mediators favourable to global mediation said that financial and property mediation should be provided as a separate service or in separate sessions. Fourteen of the practitioners were careful to specify that they, themselves, had no wish to provide the service.[30]

29 Mediators were asked if they favoured the development of global mediation. All additional comments were offered spontaneously. Seventeen of those in favour of global mediation gave no reasons for their views and offered no qualifications. Practitioners were not limited in the number of comments they could make on any issue.

30 It is important to note that the numbers given indicate only the minimum numbers of

Here are some representative examples of the mediators' concerns:

[*Do you think mediation of property and financial issues should be available to the public?*] It would be useful to divorcing couples. ... I certainly wouldn't want to have anything to do with it myself and I suppose people who did one kind of mediation probably wouldn't want to do the other. If you could find someone - presumably a lot of solicitors are adept at both - then fine. But I wouldn't want anything to do with property and all that. It would put me off the job entirely. [*Why?*] It would require a kind of knowledge about money and figures I haven't got. (in-court conciliator)

I think if people trained sufficiently. It would require far more legal knowledge than social workers have. [I would like to see global mediation] provided they [the mediators] are adequately informed and provided they refer clients back to their solicitors on any matter they are unsure about. Because property matters are very serious and a client could stand to lose an awful lot of money in a generous gesture when, if they considered their legal rights - not in an adversarial way - but everyone would come out better off with a more equitable division of the property. ... It is not something I would touch myself. (in-court conciliator)

That is a worry of mine. I don't think they [mediators] understand the importance of it [independent legal advice]. They take the line 'if people want to work out their own agreement, why shouldn't they'. They don't understand, as I see it, that if people work out their decisions without being sufficiently informed, they may later regret it and think, 'Well, I wouldn't have worked it out this way if I had known'. (out-of-court mediator)

[The following quotations were extracted from a joint interview with five in-court conciliators. A change in speaker is noted by a change in number.] #1: I think it would be useful to provide that type of conciliation but not [by] the same people who deal with the children. #2: It would be helpful if it was available on a conciliation basis but it would need to be handled by people who are specialists in that field. It is such a specialist subject. You've really got to know where you are at. #3: ... John Haynes does it all and it seems to me that he wasn't all that - he wasn't an accountant or housing agent or anything. ... #2: I think you could give advice which was really questionable if you weren't really well informed. #3: ... What we are being asked is .. are we trainable in it and I say, "Yes indeed". ... #4: I wouldn't be inclined to do it. #5: The solicitors would be extremely annoyed if we got involved on the money side. #2: I think we would be very culpable if we got involved in giving specialist advice because #1: It is not a question of advice. We don't get involved in giving advice about children either. It is a question of helping with conciliation. #2: Perhaps I worded that badly. I think unless one ... #3: If we got the training. #2: But I think it is very much a matter where the detail has got to be dealt with. It is very detailed and it has got to be

practitioners sharing a particular point of view. All of the comments were made spontaneously. Other, non-commenting mediators may have held similar views. See footnote 29.

dealt with by someone who has detailed knowledge of the legal and financial aspects of it. #s 1, 4 and 5: yes. #3: As things stand now: no, but possibly, if it was part of our training: yes.

[*So you'd like to see conciliation limited to child issues?*[31]] Most assuredly and, alright, the odd wardship and section 41. ... But issues relating to property and finance are very difficult and it could be dangerous and time consuming. I don't think it lends itself to the probation service. I can't see it. You would probably need accountants more - because you've always got someone who is rather clever at manipulating figures ... I've seen it happen so often, so you've got to be very astute, really. I'm not saying we couldn't do it but there can be so much - I mean when you listen to registrars who are dealing with estates, they can be going on for four or five days. (in-court conciliator)

I know in some areas they already do that. I would certainly want to know more about financial law if I was to attempt it. I would have thought that was more the domain of the solicitors. (*Or another possibility is you could have a solicitor on staff.*) Well, the parties have solicitors so obviously they should negotiate on that. ... I think, as a court-welfare officer, I would like to see my focus stay on the children. They have solicitors. They are getting paid for that and it is such an enormous area: financial law. I think you really need to know quite a lot about it and we don't. (in-court conciliator)

At the present time I don't think non-lawyers should be involved in mediating financial and property issues. There may come a time when people would take 2 year courses and become one-half qualified as lawyers. I'm not wild about the idea but it might happen. (out-of-court mediator)

As a separate conciliation service, in my view, from conciliation over the future arrangements concerning the children. It requires different skills from a conciliation service over child matters. [That] requires other specialist skills that I have no intention of taking up and nobody could in terms of a 2 nights a week evening course, nobody could. But it should be available and perhaps even under the same roof but [with] a different person. (in-court conciliator)

There were very few practitioners (6) who thought existing practitioners could provide global mediation without first having extensive, additional, specialized education and training. The following is an example of three practitioners debating the issue:

(The following quotation was taken from a debate among three in-court conciliators. Two thought specialized education should be required, the third did not.) #1: I'd feel very inept if I were suddenly given the task now. I don't know enough about ancillary matters, tax relief, things like that and I'd certainly need more training. #2: A clear example is where she says: "He is not seeing the kids if he doesn't pay maintenance".

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31 When asking questions I usually used whichever term (conciliation or mediation) was used by the practitioner.

> Although clearly they are two separate issues where the law is concerned; it isn't for them and you can understand why. ... I don't think it needs specialist training. #1: I certainly do. #2: You don't need to be a conveyancing solicitor to know if someone's house is worth 75,000.00 and there is only 10,000.00 left of the mortgage that there is 65,000.00 potential equity. ... #3: It would be helpful but the problems a conciliator would have! Maybe the chap said he only had one property and there are three in the brother's name. I mean the conciliator wouldn't have a clue by just hearsay. ... #2: But if we had a conciliation here: a counsel house, a husband and wife with two children and you say that the children's interests are with them staying with the mother, in the same school, whatever - you know that the husband is going to be ousted ... - so we do it anyway.

It is clear that the majority of the mediators did not think the mediators and the mediation services operating in Greater London in 1987 and 1988 had the necessary expertise for global mediation. Not surprisingly, Greater London's family lawyers shared this point of view.[32] They commented:

> There is definitely a need for trained mediators/conciliators and a bridge between the present conciliators who are trained in children's issues and the lawyers who are trained in the money issues.
>
> There is clearly scope for greater third party assistance in resolution of disputes other than through lawyers than exists at present, but such third parties will need training for which funds are not available. I consider no mediation/conciliation is better than inadequately funded and therefore 'half baked' measures in which present skills are pressed into service for which they were not and are not developed. This results in lip service only being paid to these important areas.
>
> Family law conciliation services should be encouraged and the present service increased. I consider that mediation in areas of property/maintenance etc., should not be undertaken by any person other than a qualified solicitor/barrister who has studied revenue law in depth and has a knowledge of the law relating to matters of financial provision and the ever increasing case-law ...

Family lawyers elsewhere have also questioned the educational competence of non-lawyer mediators to handle property and financial mediation.[33] The majority of the family lawyers surveyed in Greater London thought that global mediation ought only to be provided by family lawyers, or that extensive preparatory education and training ought to be required of others.[34] The mediators' and the lawyers' concerns coincide

32 For particulars, see: L. Neilson (1990).

33 Department of Justice, Canada (1988a): 18; Newcastle Report (1989): 127.

34 Ibid.

with the views of the majority of those who submitted briefs to the University of Newcastle-Upon-Tyne during their investigation of mediation services in England and Wales during 1987[35] and are supported by our examination of the practising mediators' education and training backgrounds in chapter 2.

Mediators' Reasons For Promoting Or Opposing The Growth of Global Mediation

Before we examine the mediators' proposed solutions to the education and training problem, let us find out why the practitioners proposed and opposed the growth of mediation. Is global mediation needed? If so, why? As we've mentioned, even though the majority of the practitioners had concerns about education and training, most thought it important for members of the public to have access to global mediation. Spontaneously they gave a number of reasons for their views that we shall discuss now. Twenty-nine[36] mediators argued that disputes over the future care of the children and disputes over maintenance or the division of the family's property were so entwined in the minds of the disputants that any separation of issues was difficult and artificial:

> I do find in our sessions that one gets tangled up with the issue of what is going to happen with the marital home and if this is not resolved it can affect the whole business of custody and access and everything else. ... I have found in a number of cases that if this is not resolved, you are wasting your time. It can come up right at the end: "It is OK as long as I can have the house". Or they haven't really thought through the financial consequences of their decisions - how to provide accommodation for the children - so I do have question marks about that. (out-of-court conciliator)
>
> We quite often have the situation - where she says, "He is not getting access until he pays maintenance". Until you have sorted that out, you can't really go on to anything else. (out-of-court conciliator)
>
> I can't see why [the issues can't be dealt with] at the same time - because so often the issues are linked. The legal system as it stand now divides them up. ... If mediation can do it, why can't the legal system? Because they are linked. If you are making a decision: OK you're going to keep the children; it naturally follows you're going to have to have somewhere to live and the next thing is what do we do with the property. ... They are arguing over custody because they know jolly well whoever gets

35 Newcastle Report (1989): 51-52.

36 Again, these comments were offered spontaneously. See footnote 29.

> custody will stay in the house. ... The father may then bit by bit give up his claim to custody but he needs to be legally advised on that because perhaps he has put a lot of money into it ... Whether we like it or not, they are very mixed up. (in-court conciliator)
>
> I also feel that if you are going to be dealing with children and there are financial matters which are still unresolved, these may get in the way of reaching agreement about the children because, I think, inevitably people use their positions in relation to these matters as bargaining tools. The women are stronger on the children normally, ... men are in the stronger position when the fight is about finance so I think it is very difficult to negotiate in one area without taking into account what is happening in the other area. (out-of-court conciliator)

Mediators in the United States share this point of view,[37] as do the authors of the mediation literature.[38]

Greater London's mediators stressed the connections between decisions concerning the future care of the children and decisions about their maintenance and the possession and ownership of the marital home. Those connections are obvious. But, as we have mentioned, one might contend that almost every financial and property decision the family makes during the separation and divorce process will affect the child. The child will derive his or her financial status from the parent(s) with whom he or she lives.[39] If that parent suffers from not having adequate resources to meet family needs, so also will the child suffer.[40] To a certain extent English law has recognized this connection.[41] If the child and financial/property issues are inseparable, however, then the mediation practitioners tell us that there are a number of questions requiring answers. Who should provide global mediation? How should they be selected and

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37 A. E. Cauble, R. Appleford, N. Theonnes, J. Pearson (1985): 31, found that the mediators in the United States also complained that financial and property issues were entwined with the child issues but that they were reluctant to include the service because of a lack of training. See also: Newcastle Report (1989): 310-12.

38 See, for example: G. Davis, A. MacLeod and M. Murch (1982a): 40; W. F. Hodges (1984): 32, 45-51, 54-6; H. Irving and M. Benjamin (1987): 134; J. Lemmon (1983): 45; A. Milne (1983): 18; R. Mnookin and L. Kornhauser (1979): 960; A. M. Morrow and B. Rowes (1989): 67; L. Parkinson (1987b): 118; M. Robinson and L. Parkinson (1985): 359.

39 Presumably children who spend a significant amount of time with both parents will reflect the financial situation of both.

40 See footnote 16.

41 See, for example: S v S (Minors) (Care and Control) The Times (1990) February 15; sections 3, 4, 5, 6, and 9 Matrimonial And Family Proceedings Act 1984.

trained? We shall explore the practitioners' answers to these questions in chapters 8 - 14.

For the time being, let us return to the practitioners' views of the advantages and drawbacks of global mediation. The next most commonly given reason (by nineteen practitioners) for advocating the growth of global mediation was a perceived public demand for the service.[42] The practitioners said that:

> I had a report from [another service] and they deal with it all and I think that is great and that is what the demand is. That is what clients need and often that is what they come for. (out-of-court conciliator)
>
> There is a lot of demand. We have a couple coming in this afternoon. They are not married. Quite often it is the second divorce. One client, he had such an expensive divorce, he wasn't going to do it again. (out-of-court mediator)

Other reasons the practitioners[43] gave for being in favour of global mediation were: it would be better to sort out all of the issues at once to reduce the family's overall conflict level:

> If mediation over property and money takes the conflict out, that is good and then there is more money to go around for the kids. (in-court conciliator); [44]

or that it would have the advantage of saving the disputants money or contact with lawyers:

> The other time when we do deal with it quite openly is when solicitors send people to us to save money. ... So if they clearly know what they have to dispose of and they've only got to sit down and decide how to do it in a fair manner, and they are half way there already, it can save them quite a lot of money to do it here in 1 or 2 sessions. (out-of-court conciliator) [45]
>
> [I suggest they] get an accountant to mediate; [so that] they can get the

42 For some information on client demand in the United States, see: A. E. Cauble, R. Appleford, N. Theonnes, J. Pearson (1985): 33; M. Little, N. Theonnes, J. Pearson, R. Appleford (1985): 10; J. Pearson and N. Theonnes (1985a): 463.

43 Six practitioners commented in this way. Again, these comments were offered spontaneously. Other practitioners might have agreed. See footnote 29.

44 See also: G. M. Parmiter (1981): 196.

45 Full financial and property mediations tend to take longer than one or two sessions, see comments Appendix A-1, service 6. Perhaps the cases being referred to here were unusually straightforward.

> most out of it, the lawyers the least and the tax man even less. (in-court conciliator)

The twenty-six practitioners who were opposed to global mediation also had valid reasons for their points of view. We shall discuss here only the five arguments most commonly offered.[46] We have already mentioned the argument made by thirteen of the opposing practitioners: that in order to provide the service, mediators would need to take extensive, additional educational and training. We should note here the high priority accorded to educational and training concerns. Twelve of those opposed to the development of global mediation feared a loss of focus and emphasis on the interests of the children:

> (*Do you think mediation should extend to property and financial issue?*) I don't think so. It would put too many things in the melting pot. ... [You need to] get the parents to apply their minds to the children. Sod everything else: not relevant. (out-of-court conciliator)

This mediator raises an important issue. We have already mentioned the notion that it appears that children derive their financial well-being or lack thereof from the parent(s) with whom they live. We also noted that English law recognizes this connection. It is readily apparent, however, that any recognition of a direct connection between child and financial or property matters is problematic because it can lead to inappropriate forms of bargaining, for example, trading time with or power over the children for financial or property gain. We know that parents often bargain in this manner, whether they are negotiating in the adversarial system with the help of lawyers, outside the adversarial system without any assistance, or with the help of mediators.[47] It is a reflection of the economic reality that most women and their children face upon divorce[48] and of the ways that power is currently balanced within many families. If

46 Again, these comments were offered spontaneously. See footnote 29. The other arguments were that global mediation would not be feasible because: someone always looses in financial and property negotiations (1); the decisions made in property matters are final (1); unlike in child issues, the disputants have no expertise (1); it is too early in mediation's development to provide the service (2); the addition of those issues would unduly lengthen the process (2); it would cost too much (1).

47 See, for example: H. Erlanger, E. Chambliss, M. Melli (1987): 585; J. Lemmon (1983): 45; M. Robinson and L. Parkinson (1985): 359; L. Weitzman (1985): 161, 224-245.

48 See, for example: J. Eekelaar and M. MacLean (1984a) (1984b) (1986a) (1986b); B. Lowe

dispute resolution services were limited to child issues, or if those matters were resolved first in separate sessions, the opportunities for inappropriate forms of trading would arguably be reduced and the focus on the needs of children maintained.[49] One of the practitioners commented as follows:

> (*This practitioner was in favour of global mediation but concerned that child mediation and mediation of financial and property issues be kept separate*) I think they [mediation of property and financial matters and mediation of child issues] must be separate. The fact that [financial matters] get in the way is bad. It is bad parental practice and if I allow the two things to go on like that in the same room, I am colluding with bad parental practice. I definitely want them separated but the service must be there. (in-court conciliator)

The problem is not one-dimensional. If mothers with children, who often appear to have power over issues affecting the children, are not given the opportunity to retain some of this power, they may be disadvantaged in their financial negotiations with their husbands, who usually have most of the economic power. The woman whose spouse has just agreed to give her sole custody, care and control, or primary residence and responsibility for the children, would wield tremendous power when entering financial and property negotiations. It appears, however, that mediation is more apt than other processes to result in agreements between parents to split responsibility and power over and time with the children.[50] Many women entering financial negotiations after mediation of the child issues, therefore, will be entering the process in a weakened bargaining position. The possibility that splitting child and financial/property mediation may lead to disadvantages for women is worthy of consideration.

The position of women in mediation is not yet clear. Current research literature suggests that men and women negotiate differently: that women tend to place

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(1986); O. R. McGregor, L. Bloom-Cooper, C. Gibson (1970); J. McLindon (1987): 351; C. Rogerson (1990-91): 377-484; A. Sev're, A. and M. Pirie (1991): 318-337; C. Smart (1984): 9; R. Warshak and J. Santrock (1983): 29; L. Weitzman (1985).

49 A. Milne (1983): 18.

50 See, for example: B. Bautz and R. Hill (1991): 204-6; Department of Justice, Canada (1988a): 35, (1988b): 112, 274; R. Emery and J. Jackson (1989): 8; R. McKinnon and J. Wallerstein (1987): 43; J. Pearson and N. Thoennes, (1984d): 514, (1984b): 255; Newcastle Report (1989): (category b) 227; L. Weitzman (1985): 234; but see also: J. Kelly (1990).

an emphasis on resolving the interpersonal aspects of their disputes while men tend to be most concerned with resolving the practical issues and with the outcome.[51] If this is generally true, it could have serious implications. Perhaps women will tend to trade financial security and property rights (and indirectly the financial and property rights of any children who will be living with them) for peace and interpersonal goodwill. We know that historically informal justice has tended to operate in favour of the more powerful members of society.[52] We don't yet know if mediation will follow this trend and operate against the interests of women. The research literature on women in mediation is contradictory. Several studies have shown that women complain more about mediation than do men;[53] other studies have found that women find mediation beneficial.[54] Some studies have shown that women benefit as much or more from mediation than from the adversarial process,[55] while other studies show them to be somewhat disadvantaged by the process.[56] For an illuminating study touching upon the problems that women face when lawyers negotiate for them, see: H. S. Erlanger, E. Chambliss and M. Melli (1987). One might well argue here that the interests of the children should be given priority over those of women, but then we must ask whether or not the well-being of children can be separated from the well-being of the person with whom they live. In order to shed some light on the advisability of separating child

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51 See, for example: K. Kressel (1985): 51-56; L Weitzman (1985): 313, 315; B. White: 106.

52 See, for example: R. Abel (1982); J. Auerbach (1983); H. Erlanger, E. Chambliss, and M. Melli (1987): 603; O. Fiss (1984); L. Friedman (1977); L. Girdner (1987); M. Lazerson (1982); S. E. Merry (1989); S. Roberts (1986); J. Roehl and R. Cook (1989): 44; F. Sander (1983): 11; B. Yngvesson (1985); I. W. Zartman and M. R. Berman (1982): 205.

53 See, for example: G. Davis (1988a: 66; R. Emery and M. Wyer (1987b); R. Emery, S. Matthews, and M. Wyer (1991): 410-8; H. Irving and M. Benjamin (1988): 46; J. Pearson and N. Thoennes (1985a): 488; D. Saposnek, J. Hamburg, C. Delano, H. Michaelsen (1984); 14-15; J. Waldron, C. Roth, P. Fair, E. Mann, J. McDermott Jr. (1984): 16.

54 For example: G. Davis and M. Roberts (1988): 112, 128, (1989): 305-6; J. Kelly (1989): 84, 86.

55 For example: C. Camplair and A. Stolberg (1990):204, 209; G. Davis and M. Roberts (1988): 112, 128, (1989): 305-6; Department of Justice, Canada (1988a): 32; J. Heister (1987): 97; J. Kelly (1989): 84, 86; J. Kelly and L. Gigy (1989): 279-280; J. Pearson (1991): 179-97; J. Pearson and N. Thoennes (1988a): 80.

56 For example: R. Emery and J. Jackson (1989): 12; J. Pearson and N. Thoennes (1989): 18.

issues from financial and property ones, we need research comparing the circumstances and opinions of women and children after mediating child, financial and property decisions in one process, to their circumstances and opinions after mediated child issues first and then the financial and property issues in a separate process.[57] If in fact the separation of issues prevents inappropriate forms of bargaining and keeps the focus in the earlier sessions on the children while having no or few ill effects on women or their children, the model might well be worthy of further consideration. It is likely, however, that the twenty-nine practitioners who argued that child and financial issues are entwined are correct. If so, we might expect to find the child issues being renegotiated during the financial and property mediation sessions.

Returning now to the reasons that practitioners gave for opposing the growth of global mediation, we previously noted that twelve of the opposing practitioners said that they thought negotiations over property and financial issues should stay in the hands of the lawyers. These practitioners argued:

> We don't have that expertise anyway. There are lawyers and registrars who are skilled in dealing with those [matters]. That is a job for lawyers. (in-court conciliator)

Six practitioners were opposed to the development of global mediation because they were concerned about becoming involved in professional disputes with the legal profession:

> It could come with time that the probation service was doing global mediation but the lawyers would rather die than see it happen. ... It would offer a serious problem for them. It would offer a different service from settlement by lawyers. We would have to be trained to our eyebrows and work closely with registrars. ... At the moment we work in partnership [with lawyers] so we don't touch those issues and most of our referrals come from solicitors .. and I don't see any problem with that system. If the probation service did offer conciliation on all issues .. it would still need ... a lawyer on the team and that costs money. You've got to have someone who can say, "That's fair" and then they can go back to their own lawyers. (out-of-court conciliator)

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57 I have not considered the possibility of mediating the financial and property issues first since many of those issues cannot be determined until the parents decide with whom the children will be living and where they will attend school.

The other reason several (six) practitioners gave for being opposed to global mediation was that they were concerned about disclosure and verification of financial affairs:

> (The following quotation is of a registrar) It could be a problem unless special rules were devised to ascertain what the financial position of each party is. There are a lot of procedural rules [in the adversarial process] and even so it is not always easy to get a true and frank disclosure and unless you have a true picture of the financial position of the parties, it is difficult to reach a conclusion on what is fair and just. ... I don't say it is impossible.

This registrar's comments are in accordance with the research of W. B. Baker, J. Eekelaar, C. Gibson and S. Raikes.[58]

If full financial disclosure and valuations become problematic within the adversarial process despite the procedural safeguards of the legal process, one would expect to find even greater difficulty in mediation. This aspect of mediation may have grave implications for those spouses, usually women, who do not have ready access to information about and knowledge of the other spouse's financial affairs.[59] In order to combat this potential problem, mediators will need to know what information and documentation a woman needs to verify her husband's disclosures, and what information and documentation will be required by other professionals in order properly to value the family's assets. They will also need to understand the implications of lack of disclosure; to have some idea of the ways a disputant might limit the dangers and results of any lack of disclosure; and to recognize when disclosure or valuation problems are occurring so that they know when it is necessary to terminate mediation. This requires a certain amount of legal knowledge and expertise.

It is readily apparent that those who opposed global mediation shared similar concerns with those who favoured the process. Uppermost in the minds of most of the mediation practitioners was the question of how one would ensure adequate education and training of the practitioners. Some mediators suggested that this need could be met

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58 'Matrimonial Jurisdiction' ISSN 0309-6408.

59 A. Mitchell (1981): 38.

by offering additional education and training to existing practitioners. Others suggested circumventing the problem by including or leaving the field to lawyers. This leads to another series of questions. If global mediation services are needed, who should provide them? Should lawyers become involved in mediation? If so, do people with experience in the field envision any problems that lawyers will need to overcome? We shall leave to chapters 8 and 9 our examination of the practitioners' views on the suitability of lawyers for mediation. Let us turn here to an examination of the practitioners' answers to the first two questions.

Preferred Models For Global Mediation Practice; Do The Mediators Want To Work With Family Lawyers? [60]

We have already seen that thirty-three of the practitioners stated, without solicitation, that they envisioned the need for lawyers to be more actively involved in mediation before global mediation services were developed further.[61] When we look at the mediators' preferred models of global mediation practice in Table 7-4, we find thirty-six proposing models that included lawyers.[62] Most of this group (twenty-seven) were recommending that existing practitioners co-mediate with family lawyers:

> [*Do you think it would be a good idea if conciliators co-mediated with lawyers?*] If we are extending beyond access, it is vital to have a mix of the two professions. (out-of-court conciliator)
>
> The Solicitors In Mediation approach is possible. I think it has to be a joint social worker and lawyer if it is going to be anything at all. I don't know enough about property law and so on to get into that. (in-court conciliator)

For an example of this model, see Appendix A-1, Service 11. Four of the thirty-three, however, envisioned lawyers providing financial and property mediation in separate

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60 The numbers in this section are not always the same as in the previous section because here we are concentrating only on the practitioners' first preferences and because some practitioners had a preferred model but did not make specific comments about the need for prerequisites to global mediation practice.

61 Not surprisingly family lawyers working in Greater London agreed: L. Neilson (1990).

62 Several of these practitioners had not commented on the need for prerequisites to the growth of global mediation.

sessions; three envisioned greater participation from lawyers, but as advisors only;[63] and two thought the process should include all disputants, their lawyers, and the mediator:[64]

> Would I like to be able to sit down with the couple and their two solicitors? Yes, I would! Because it would make a normally divisive exercise more cohesive and it would save money. I would want it to happen here - so that the informality was stressed, ... I would like that very, very much. I would need a lot more training but I am just beginning to get along that way as a team and we are moving in that direction. (out-of-court conciliator)

This model has some advantages. It might be ideal for disputants needing or wanting some partisan support during negotiations, and it would integrate that support with immediate access to legal information and advice. It might also be a good way of obtaining the co-operation of non-mediator lawyers. Perhaps it is also the model that many clients would prefer.[65] The model has certain advantages over the model being used by Service #11, Appendix A-1, in that it involves two rather than three lawyers and offers partisan support within the process. The disadvantage is that the model has the potential to concentrate power in the hands of partisan lawyers rather than those of disputants, making the process similar to, rather than an alternative to, the services already offered by family lawyers.

Table 7-4 tells us that another twenty-two mediators[66] wanted to see the development of education and training programmes to upgrade the skills of the existing

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63 One of these practitioners suggested a novel way to include lawyers as advisors but still maintain mediator and disputant control:

> Maybe legal advisors can be trained to sit in the corner and give legal information and not opinions - or with a computer, [you could] switch into the lawyer for legal advice and when you don't want him, [you could] switch him off again. (out-of-court conciliator)

64 Another two practitioners mentioned this model favourably but appeared to prefer co-mediation and so were placed in the other category. See also: J. McCrory (1987): 152; H. McIsaac (1988): 9.

65 See, for example: G. Davis and K. Bader, 'Consumer' (1985b): 85.

66 Earlier we noted that 51 of the mediators advocated the establishment of preparatory educational programmes for mediators, and that another 33 spoke of the need for mediators to work with lawyers in global mediation. Here we find that 23 mediators preferred the establishment of educational programmes for mediators to involving lawyers in global mediation. The numbers are different because we are discussing only the practitioners' first preference in this section.

mediators instead of the development of co-mediation services with lawyers; and that forty-four mediators were clearly against financial and property mediation (twenty-six) or did not clearly express their preferences (eighteen). If we exclude the eighteen mediators who did not express their preferences, it seems, at first glance that the majority (57.1%) of the mediation practitioners - the twenty-two who wanted educational programmes for existing mediators and the twenty-six who wanted to limit mediation to child issues- preferred to exclude lawyers from mediation practice. When we examine the mediator's attitudes in more detail, however, we find that the practitioners had reasons other than the exclusion of lawyers for wanting to limit mediation to child issues. We shall also find that, while many of the practitioners had questions about the aptitudes of the majority of lawyers for mediation, the majority were prepared to welcome at least some lawyers as mediators.

When the practitioners were asked specifically whether or not they thought lawyers trainable, we find (see Table 7-3) that the majority thought at least some lawyers would make good mediators. We also find, however, that a large minority of the practitioners were non-committal. It is entirely possible that some of this group were reluctant to express their disapproval of lawyers.[67] Table 7-3 also tells us that eight practitioners thought lawyers unteachable.[68]

Practitioners who were opposed to lawyers receiving training were most concerned about the dramatic changes lawyers would have to make in their normal roles with clients:

> I wouldn't suggest solicitors train as conciliators, although they need to be aware of the skills. [It is] an impossible situation because their job is to make the best case for their client and it is so different, so opposite, I think it would be much too difficult for them. (in-court conciliator).

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67 See footnote 12.

68 When we look at the entrance requirements practitioners proposed for entry into mediation programmes in chapter 9, we shall find that an additional 13 practitioners did not recommend training for lawyers. Not all of these mediators specifically addressed the possible entry of lawyers, however, often because they were thinking of mediation services being limited to child issues.

Occasionally, professional fears became evident:

> Don't we provide the service already? Why would lawyers need this training? (in-court conciliator)

Some mediators were concerned about a perceived lack of understanding among lawyers of people, their interactions, and their conflicts:

> What they can't quite understand is the difference in the dynamics and they can't understand why they can't do it. One got very upset - it had taken him six months and it took us three weeks. All they did was deal with particular dates and tried to find dates which suited. What we did was say, "Why are you arguing so much about this" and that is a big difference. (out-of-court conciliator)

While, as we saw in chapter 6, it may not be advisable to include therapy in mediation, this last mediator has a point. It is important that mediators understand what is causing the disputants' conflict. It is also important that, if the disputants wish, these causes are brought out into the open so that the disputants feel heard and understood, and so that the totality of their conflict is considered. The difference between the mediator and the therapist or the counsellor is that the mediator does not seek to change the disputants or their view of the problem, or to cure them, but instead tries first to understand the conflict as the disputants understand it and then tries to help them find practical ways of solving or containing it. For example, the mediator who focuses on dates and times for access isn't going to be very successful if the reason that the mother objects to access proposals is that she is worried about the father's alcohol consumption. Instead, the mediator will have the disputants fully explore the mother's concerns and fears in order to enable the disputants to generate practical proposals that will contain, minimize, or address those fears. Unlike the therapist or counsellor the mediator will not be trying to cure the father's alcoholism or to change the mother's relationship with the father so that she can better accept this aspect of his character. Returning to the mediator's point: perhaps many lawyers do not fully understand conflict-resolution. Perhaps their professional experiences do lead them to focus exclusively on the legal

aspects of their cases and to discount other, equally important, human elements.[69] We shall come back to this issue in chapter 9.

Not all of the seventy-three practitioners who favoured including lawyers in mediation training would encourage all members of the profession to try to become mediators. Six of the practitioners stated that they did not think that the majority of lawyers were suited to the process; they stressed the fact that lawyers would first have a great deal of unlearning and learning to do. Another twelve said that lawyers' services would only be welcome during sessions dealing with property and financial matters. Twenty-one of the practitioners in total, including those who did not think lawyers trainable, specified that they would exclude lawyers from mediation of child issues. Interestingly, while the family lawyers surveyed in Greater London were confident of their own expertise in financial and property matters, and while the vast majority thought that lawyers should mediate all issues, a sizable minority questioned their own competence in areas relating to children.[70] We see here that the majority of the mediation practitioners had concerns about their own existing competence to handle property and financial matters but that they were relatively sure of their competence in child matters. This would appear to support arguments in favour of splitting financial and property mediation from child mediation, or arguments in favour of lawyers and mental health practitioners mediating together, at least until adequate education and training programmes can be devised. When we discuss the practitioners' proposals for the education and training of new entrants to mediation in chapter 14 we shall find that the training recommended for those who would engage in global mediation was lengthy. Programmes of one- and two-year's duration were commonly recommended, both by mediation and by family-law practitioners, for non-lawyers who would practice global mediation.

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69 See, for example: J. Falke, G. Bierbrauer, K. Koch (1978): 145-6. We shall return to this issue in chapter 8 when we discuss the types of people who should be trained to do mediation.

70 L. Neilson (1990).

Summary, Conclusions, And Discussion

Global mediation was relatively rare in Greater London in 1987 and 1988 but was growing, albeit haphazardly. The haphazardness of the growth was worrying because few of the mediation practitioners had any education and training in finance, maintenance, or property law.[71] It was even more worrying to discover that a large minority of the mediators appeared to be stepping outside their roles as mediators in attempting to offer disputants legal opinions and advice. Given the mediators' lack of qualifications to give that advice, and the importance and finality of property agreements and orders, the dangers of disputants thinking they could rely on this type of advice when working out their future financial and property affairs are obvious.[72] The majority of the mediation practitioners were somewhat cognizant of these dangers, however. Most agreed with Greater London's family lawyers that mediators should not become more involved in global mediation without the participation of lawyers or without further training. Education was the primary concern of both legal and mediation practitioners.

While the majority of the mediators had educational concerns, most favoured the development of global mediation. The practitioners felt that disputes about children and about financial and property matters were so closely intertwined that the separation of issues was artificial and problematic. They worried, however, about whether or not global mediation could maintain mediation's focus on the needs and interests of children. A few practitioners suggested the use of separate sessions or services to keep the focus on child issues in the early sessions; others rejected global mediation on this basis. We saw that there are potential problems for women and children stemming from both points of view, problems needing further research.

The mediators were also divided in their opinions about how educational

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71 See chapter 2. This is assuming the mediators need knowledge of the subject matter of mediation. Perhaps this is not correct. For further discussion, see chapter 8.

72 See also chapters 9 and 13.

shortcomings in mediation should be rectified. Many (thirty-six) wanted family lawyers with the necessary substantive knowledge to provide or to help provide the service (either alone or with the assistance of existing practitioners). Others (twenty-two) preferred to see educational programmes developed to give existing practitioners the knowledge and skills that they would need to provide the service. Although most of the mediators were prepared to allow at least some family lawyers entry into mediation,[73] some wanted to limit entry to a select few; others wanted to limit lawyers to mediation of financial and property issues. Greater London's family lawyers had similar views. They wanted to see substantial improvements in the education and training of mediators, or they wanted mediators who were not lawyers to be limited to mediation of minor disputes over children.[74] Most mediators did not wish to exclude lawyers from child mediation; similarly most lawyers did wish to exclude all non-lawyers from financial and property mediation, conditional on the development of adequate education and training programmes. We find here indications of professional fears, but also valid educational concerns and an apparent willingness among the practitioners of both disciplines to try to overcome professional differences through education and training.

This completes our discussion of the nature and scope of mediation. We shall need to keep the professions of the mediators and the scope of the mediation they practised in mind as we examine the mediators' proposals for the education and training of new mediators. Certainly the forty practitioners who would not mediate property and financial issues,[75] and the twenty-one practitioners who would only do so while working with a lawyer; would envision less need for legal, financial, and property knowledge than those who were prepared to offer global mediation without the assistance of lawyers. We shall find in chapter 13 that the views of these practitioners

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73 See also: A. Elwork and M. Smucker (1988): 21ff.

74 L. Neilson (1990).

75 Twenty-six mediators were opposed to global mediation and another fourteen specified that they would not, themselves, offer mediation of property and financial issues.

affected the levels of endorsement for education in financial and property law. The diversity of mediator views on global mediation and the dearth of global mediation experiences of the majority of the mediation practitioners will cause us to supplement the mediators' opinions with those of practising family lawyers in the ensuing chapters.

Before we examine the practitioners' proposals for the education and training of mediators, however, we must first consider several subjects central to the practitioners' views on mediator education and training. In addition to appreciating the practitioners' understanding of the role of the mediator in the mediation process, and to realizing the types of disputes and conflicts to be addressed, we shall want to know something about the type of person that the practitioners' envisioned training. Whom did the practitioners think should be trained to do mediation? What qualities did they think these people should have? Are the prior education and training and professional backgrounds of mediation students relevant? What are the perceived benefits and drawbacks of these backgrounds? How do mental health practitioners and lawyers assess each other's potential as mediators? In chapter 8 we proceed from our discussions of the scope and parameters of the mediation process to a discussion of the types of people who will learn to provide the process.

CHAPTER 8

The Mediators: Personal Attributes Needed For Practice

Introduction

Chapters 4, 5, 6, and 7 have given us an appreciation of the mediation practitioners' understandings of the mediation process: its goals, its subject matters, and the roles of its practitioners. Our apprehension of the task that mediators are to perform, gives us a foundation from which we can evaluate the practitioners' educational proposals. If we are to put the proposals into context, however, in addition to apprehending the task of mediation, we shall also need to know something about the types of people the practitioners sought to admit into their proposed training programmes, and something about the level of expertise they hoped trainees would have at the end of their training period. These topics form the nucleus of chapters 8, 9 and 10.

In chapter 8 we shall centre our discussions on the personal qualities needed by mediators. As part of our discussions we shall need to consider whether or not education and training is even an important issue. Perhaps personal characteristics and not education and training govern one's ability to do mediation. Throughout this study we have assumed that mediators need to have knowledge both of the subject matter of disputes and of the mediation process. Perhaps this assumption is not correct. The research literature is contradictory. Some studies suggest that those with more mediation experience,[1] and those perceived by disputants to have more ability,[2] tend to be more successful. It also appears that general knowledge of the matters in dispute may be

1 T. Kochan and T. Jick (1978): 229; J. Pearson and N. Thoennes (1988b): 436.

2 D. Brookmire and F. Sistrunk (1980): 323;

related to outcome.[3] Other researchers, however, have not been able to establish a connection between the professional background of the mediator (which one might expect to be strongly related to education), or education, and mediator success.[4] We must consider the possibility that mediators do not need education and training in order to perform the roles that the mediation practitioners have identified. Perhaps mediation is an art, requiring only dedication and the application of natural aptitudes and talents. Perhaps the practitioners considered personal attributes more important than either substantive or procedural knowledge.

We begin our discussion with an examination of the practitioners' views on the need (or lack of need) for mediators to acquire education and training. We shall find that the vast majority considered specialized mediation education and training necessary - although not necessarily more important than personal characteristics. Indeed, there was a virtual consensus among the mediators about the importance of mediators having certain personal characteristics; most thought these more important than the acquisition of knowledge or skill development. Thus, while the practitioners considered education and training of mediators to be vital, they warned that it would be a mistake to require formal educational prerequisites for mediation practice at the expense of requiring certain personal attributes.

We need to know, therefore, the requisite personal attributes. As we examine Table 8-3 and the practitioners' comments about the personal qualities needed by mediators throughout this chapter, we shall find that these mirrored the goals of mediation and the role of the mediator as these were identified in chapters 4, 5 and 6. Before we examine the practitioners' comments in detail, however, let us first preview their views in condensed form:

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3 P. Carnevale, R. Lim et. al. (1989): 229.

4 A. Elwork and M. Smucker (1988): 21; T. Kochan and T. Jick (1978): 229; SPIDR (1988): 13. For further discussion, see chapter 9.

TABLE 8-1
Can a caring, warm person provide mediation, or is further specialized education and training needed?

	Number	Percent
Personal Characteristics Alone Are Sufficient:	3	3.3%
Mediators Also Need Specialized Training:	39	43.3%
Mediators Also Need Prior Professional Experience and Specialized Training:	48	53.3%
TOTAL:	90	99.9%

Another 6 of the practitioners stressed the importance of education and training but were not clear about whether it was or was not also necessary to have had previous 'professional' experience. The remaining 6 made comments that could not be classified (3) or the issue was not discussed during the course of the interview (3).

TABLE 8-2
Mediator Ranking of the Importances of Personal Attributes; Skills and Techniques; and Education and Substantive Knowledge *(First preference only)*[5]

1 - Personal Attributes
2 - Skills and Techniques
3 - Formal Education and Substantive Knowledge

	Number[6]	Percent
1 is the most important	44	44.9%
1, 2, and 3 are entwined and equal	30	30.6%
1 and 2 are equal and the most important	1	1.0%
1 and 3 are equal and the most important	7	7.1%
2 is the most important	13	13.3%
2 and 3 are the most important	1	1.0%
3 is the most important	2	2.0%

5 The mediators were specifically asked to rank the importances of these attributes for effective mediation.

6 The topic was covered in 98 of the interviews.

TABLE 8-3
The Personal Characteristics Needed By Mediators[7]

44 : A Non Directive Nature	24 : Intelligence
40 : Empathy and warmth	19 : Maturity and Age
40 : Firmness or Assertiveness	16 : Intuition and Perceptiveness
39 : Professional Objectivity	15 : An ability to allow Ambivalence
36 : A Non Judgmental Nature	14 : Common Sense
31 : Self Awareness	14 : Neutrality
31 : Flexibility	13 : An Ability to tolerate conflict
29 : Listening Skills	11 : Communication Skills
28 : Life Experience	10 : A Sense of Humour

Do Mediators Require Education Or Simply The Right Personality?

If we are to understand Tables 8-1, 8-2, and 8-3 fully, we must examine the practitioners' comments that gave rise to them. In Table 8-1 we find that the practitioners were asked if they thought a kind, caring person could do mediation or if they thought education and training also required. Table 8-1 tells us that very few of the practitioners thought that the personal attributes needed to perform mediation, were sufficient.[8] Those few argued as follows:

> Some people are born conciliators and can do it without training. Personality is very important. (out-of-court conciliator)
>
> I think you can do it from a commonsense point of view. I would never want to do deep counselling and I'm not trained to work with children but I could do other types of problems. (out-of-court conciliator)

Another, larger group of mediators argued that personal attributes were a good place to start but that education and training were also needed prior to mediation practice, as follows:[9]

> The majority of people who work in conciliation have some background

7 This was an open-ended question. Mediators were not limited to one answer. Failure to endorse a category does not reflect lack of agreement.

8 Quotations were chosen by their abilities to represent the range of responses within categories or because they contained particularly interesting discussions of the issues involved. The practitioners were not limited to a set number of responses. Whenever the practitioners' opinions changed during the course of the interview, the practitioners were classified in accordance with their last thoughts on the issue.

9 At this point I am not separating mediation of child from mediation of property and financial issues. Most of the interviewees (see chapters 2 and 7) practiced only child related mediation and so were answering my questions on the basis of those experiences. For discussion of practitioners' views of property and financial mediation, see chapter 7.

> in social work or the legal side of things. I think, because of the simplicity and because by and large it relies on common sense, you could train someone without that background. (out-of-court conciliator)
>
> One of the most important things about Marriage Guidance [*now called Relate*] is the selection process. It chooses people who think a particular way. Training is limited in a way: only 6 to 8 sessions depending on the system running. What mediation needs to do is [to] choose people who are non-judgmental, non-shockable, and caring but not so much they are going to get too emotionally involved. So I think people who have a particular approach, with the sort of training which gets grafted on, by working alongside others. (out-of-court conciliator)
>
> I have mixed feelings, partly because of the Newham Conflict and Change Project[10] ... One of the principles of that was [that it would use] selected volunteers, local people who would reflect the community and were lay, not professional people. Whereas here [in a family/divorce conciliation service] you need professionally qualified people. Part of me thinks you need facilitating skills and listening skills but we are not in the business of making professional judgements here so maybe you don't need to be a professional social worker or whatever but having said that, I wonder if that is really the case. ... What I do think is: what we do in conciliation is not the same as what a social worker does or a lawyer does so even if you get professional people, there is a whole body of skills and knowledge which is quite specific. So to what extent being a lawyer or a social worker is a valid requirement, I'm not sure. (out-of-court conciliator)
>
> Well, that depends on what sort of education and training. Long before there was conciliation, members of families or the community have all been negotiating between warring partners ... so I'm not sure what training they need. ... I think what I'm trying to say is you don't need to be a social worker. It may help but I'm not convinced. [Mediators] can come from all walks of life. Temper is important too, the ability to maintain an objective point of view in the face of a lot of conflict. It is not something you can be trained in but if you are going to fly off the handle and start taking sides, you aren't going to be very good. (in-court conciliator)

As we see in Table 8-1, however, the majority of the mediators held that personal attributes together with education and training were still insufficient; that before entering educational programmes, mediators should also have had some related 'professional'[11] experience. They argued as follows:

> Maybe I'm stupid but I think it is terribly complicated, because there is so much going on, in terms of these two people getting a divorce who you are trying to convince to act as parents rather than as a distressed

10 The service mediated community disputes.

11 The term 'professional' continues to be used in its broad rather than technical sense. For a definition of our use of this term, see chapter 2. See also chapter 10 for further discussion.

couple. ... I couldn't have done it without considerable training really. ... If you don't know what you are doing, you can do more harm than good. You have to learn your own weaknesses and biases; you have to move beyond what you did in your own marriage. (in-court conciliator)

[*The following is a debate among three in-court conciliators, two of whom thought it necessary to be professionally qualified in order to practice mediation, and the third who did not.*] #1: I think anyone with life experience and common sense can do it. #2: I think you need some casework experience. #3: I can't imagine doing it without. #1: I think our social work skills sometimes cut across and make us see things we don't need to see, in terms of personal growth, whatever. Perhaps a well-meaning amateur gets more quickly at the roots of the dispute. ... I'm not sure all these casework skills - that that is what is needed in conciliation. #2: I disagree. You are being terribly bluff about this. I saw you working this morning and you damn well knew what you were doing. You joined with him when it was appropriate to join. #1: But that wasn't a conciliation role. #2: But that is what you do in conciliation, isn't it? You are joining and you are going alongside and knowing when someone needs to ventilate anger and knowing how much time to give them to deal with it. #1: But the debate is whether you need professional skills. #2: But they need to ventilate and yet you need to keep it focussed, how do you do that without some sort of [professional training] #1: In real life people do that in families. ... #2: But we can't get sucked in [to the dispute] #1: Maybe I don't see those as such high skills, perhaps. #2: Maybe because they are so much a part of you. #1: I think a large dose of common sense. #2: But it is helpful to have an idea of the court and the legal process, don't you agree? #1: I'm not disputing that ... [but] whatever we [social work professionals] look for we invariably find. I think that is not always helpful.

One of the commonly given justifications for advocating 'professional' experience prior to mediation training was the need for mediators to have and maintain 'professional' detachment and objectivity. Practicing mediators in the United States have also stressed the importance of mediators having 'professional' objectivity.[12] When we look at the personal attributes that the practitioners identified as being conducive to good mediation later in this chapter, we shall find the characteristic being mentioned frequently. Many of the practitioners called this trait 'professional' objectivity; others called it resistance to over-involvement, an ability not to get pulled into disputes, an ability to maintain professional detachment, or a resistance to interpreting other people's problems in terms of one's own life experiences.

12 See, for example: C. Harrington and S. Merry (1988): 729-780; J. Pearson, M. Ring and A. Milne (1983): 20. For discussion of the relationship between this concept and mediator 'neutrality', see: Chapter 4.

Returning now to the central theme of Table 8-1, it is clear that the practising mediators considered education and training an important issue. Family Lawyers working in Greater London agreed. Many have expressed concerns about the education and training of family mediators.[13] The debate among the mediators was not whether or not people needed specialized education and training in order to do mediation. That need was assumed by almost all practitioners. The debate was whether or not mediators also need preliminary 'professional' experience. Greater London's practitioners were divided on the issue. We shall discuss this issue in greater detail in chapter 9. For the moment we need merely to note the division.

Mediators' Views of the Relative Importance of Personal Aptitude, Substantive Knowledge, and Procedural Knowledge

The fact that mediators considered education essential does not mean that they thought education and training more important than personal attributes. When the mediation practitioners were asked to rank in order of importance the need for mediators to have: personal attributes, education and training in substantive areas, and skills and techniques, we see in Table 8-2 that most ranked personal attributes first, either alone or grouped with one of the other categories. Only two of the practitioners thought personal characteristics unimportant. All of the others considered the personal attributes of the mediator vitally important, either alone or in conjunction with other attributes:

> All are essential. Without the right personality, a basic interest and sympathy with people, balanced by an ability to be impartial, one couldn't do it in a constructive and useful way. Then without at least the relevant education, one wouldn't have the tools to do it. ... Unless you are constantly evaluating and developing your skills and techniques, then there is going to come a point when you are going to stop working and simply churn out things like a long string of sausages. (out-of-court conciliator)

> In a sense, first of all personal characteristics. All the studies of psychotherapy indicate empathy, warmth, and genuineness as the essential factors so I imagine that it would apply in conciliation as well - the personal ability to engage with people. (out-of-court conciliator)

13 See: L. Neilson (1990).

> [What mediation needs to] do is to choose people who are non judgmental, non shockable, and caring but not so much they are going to get too emotionally involved. ... I don't think there is any background that I wouldn't ... Between the illiterate dustman and the university professor, I say for insight give me the illiterate dustman because the university professor [is] used to his intellectual things to create barriers and [to] distance[ing] himself from day to day emotions. The other had much more insight into ways of bringing up children. (out-of-court conciliator)

> All three are important - A knowledge and understanding of what they are doing - an understanding of the process is vitally important. And I think however much knowledge a person has, that alone won't qualify them to be a good mediator. There are personal qualities, I think there are definitely personal qualities, that enable a person to use that knowledge creatively and sensitively and there are skills and strategies which are needed but I don't think you can just apply a repertoire of skill and strategies. The dynamics are such that you have to respond to the situation as it presents itself. You can't line up a repertoire of skills and techniques and apply them. That is ludicrous. ... The parties have their own strategies. ... [You need] knowledge and personal qualities, and then strategies look after themselves, really. (out-of-court conciliator)

This all but unanimous practitioner belief in the importance of personal characteristics is supported in the literature. The labour mediation literature, for example, suggests that rapport is positively associated with mediator success, particularly when conflict levels are high.[14] We also know that consumer satisfaction with social work and therapy appears to be related to the personal characteristics of the worker.[15] While we lack family mediation research on this issue,[16] the literature tentatively supports the practitioners' suggestion that the personal characteristics that the mediators will identify for us shortly should form the gateway into mediation training.

One might argue that mediation practitioners do not know what makes a good mediator, although if they do not it is difficult to know who would. Most of Greater London's mediators regularly worked in pairs or in teams when providing mediation services; the remainder did so occasionally. The practitioners were, therefore, basing

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14 P. Carnevale, R. Lim, M. McLaughlin (1989): 213; K. Kressel (1987): 225.

15 J. Fisher and H. J. Eysenck (1976): 149; J. Mayer and N. Timms (1970): 73; S. Rees and A. Wallace (1982): 16-25.

16 Researchers would be wise to heed G. Davis and M. Roberts' finding [(1988): 60] that different sets of parents and even disputants in the same session had very different views of the same mediator.

their opinions not only on their own mediation experiences but also on the perceptions they had gained from observing other mediators. There is always the possibility, however, that mediators and disputants want to achieve different goals and have different perceptions of what mediation should offer. This phenomenon has been documented in the social-work field,[17] and we do know that mediation practitioner and disputant perceptions sometimes differ.[18] Thus, while we need further research before we can reach definitive conclusions on the personal characteristics that mediators need, we might expect the mediation practitioners at least to be able to point us in the right direction for further enquiry.

A Personality Profile Of The Superlative Mediator

When we looked at the goals of mediation and the role of the mediator in Chapters 4, 5, and 6 we saw that the practitioners identified disputant autonomy and decision-making power as among the most important attributes of the mediation process. We re-encounter the influence of that perspective in Table 8-3 and throughout the mediators' comments about the personal characteristics needed by mediators. In Table 8-3 we find that the personal trait of being non-directive was recommended by more practitioners than any other.[19] We find that the trait of being non-judgemental was fifth most commonly mentioned.[20] Mediators elsewhere have also stressed the importance of these characteristics.[21] They are also consistent with the practitioners' emphasis on the

17 See, for example: E. M. Goldberg and R. W. Warburton (1979): 13-14; D. Howe (1989); S. Rees and A. Wallace (1982); J. Sacks, P. Bradley, D. Beck (1970): 65; E. Sainsbury, S. Nixon, and D. Phillips (1982): 39.

18 See, for example the Newcastle Report.

19 a) See also: G. Davis and K. Bader (1985b): 85; J. Haynes (1984): 504.

b) The questions was open-ended. Mediators were not limited to a particular number of comments and alternatives were not suggested. Even after the practitioners' responses were grouped, 35 sets of attributes remained. We shall mention here only the 19 identified by 10 or more practitioners.

20 Others have also mentioned this trait. See, for example: M. Baker-Jackson, V. Hovespian, G. Ferrick (1984): 24; J. Haynes (1984): 501; C. Micka (1989): 90; National Family Conciliation Council (1987): 9; D. Saposnek (1983): 35.

21 For example: T. Becker and C. Slaton (1987): 61; J. Bercovitch (1984): 52-53; and G. Bierbrauer, J. Falke, and K. Koch (1978): 82. In all three studies, the mediators surveyed ranked the 'non judgmental' attribute highly. See also: footnotes 19(a) and 22 and 23.

importance of disputant autonomy throughout.

The traits are connected to respect both for the individual and for disputant autonomy, attributes which are similar and probably related but not the same. The 'non-directive'[22] attribute refers to how one acts towards people; for example:

> It is the parents' views that count and that can be quite difficult if you are hearing things you firmly disagree with and the other parent is not disagreeing. Then you have to keep quiet because you aren't making the decision, they are. ... [For mediation you wouldn't want] someone who wants to be authoritarian and wants to tell parents what to do and I've worked with a conciliator who very much did this, who said, "Well, you should be doing this", and they may have been right in child care terms but as far as I am concerned that is not what conciliation is. (in-court conciliator)

> Part of [mediation's] value and appeal is that it is not about the expert, the expert, or guru imposing what they think is right. The very skill is enabling people to discover for themselves. ... It is about giving power back to them. (out-of-court conciliator)

The 'non-judgmental' attribute,[23] however, refers to how one looks at others. For example:

> [I would be looking for] someone who does not: adopt a judgmental attitude to life styles or approaches to child upbringing; [someone who is] open-minded; a person who is sensitive to people, particularly people under stress. (out-of-court conciliator)

> [I would be looking for] parents who have an understanding of some of the problems people have when they are separating and [who have] lived long enough to be tolerant and to understand that people may need time to adjust. (out-of-court conciliator)

In chapter 9 we shall be looking the suitability of lawyers for mediation. As part of our discussions we shall compare the role of the lawyer to that of the mediator. We shall find that lawyers tend to assume control of their clients' problems, that they are authoritarian, and that while they do provide personal and professional support to their clients, they tend to advise (tell) their clients how to resolve their problems. We should not be unduly critical of that role. It appears that many people want and need

22 Other comments included: mediators should not assume the role of expert; be didactic, authoritative, bossy, officious, controlling, domineering; need to impress or impose their own views.

23 Also included in this category were those who said that mediators should be tolerant, accepting of others and should not be moralistic.

partisan support.[24] We do need to question, however, whether or not these traits are desirable in mediators. They clash with the goal of disputant power and autonomy that the mediation practitioners have identified as one of the most important attributes of mediation and with the 'non-directive' and 'non-judgmental' personal characteristics that the mediators have proposed here. If the practitioners are correct about the need for mediators to be non-directive and non-judgemental, it appears that many lawyers entering the field will need to learn new forms of behaviour and new attitudes to replace their partisan ones. We might expect that those who are partisan and directive by nature will have great difficulty making and maintaining these changes, while those who are partisan and directive solely in response to the demands of their clients and the adversarial process will have less difficulty. Can mediation safely assume that it will attract only those lawyers who are interested in the promotion and protection of disputant autonomy and not those who wish to adjudicate or those who wish to expand their adversarial roles into the domains of mental health and the behavioural sciences?

We encounter similar problems when we consider the suitability of family therapists. In chapter 6 we discussed the place of therapy in mediation. We saw how therapy, even therapies that do not involve the therapist in the final decision-making process, are directive and intrusive. It appears that therapists, as well as lawyers, may have to change the way they look at and behave towards disputants if they are to be 'non-directive' and 'non-judgmental'. We might also ask whether or not mediation can we safely assume that only those therapists who wish to promote and protect family autonomy and freedom from 'expert' control will be attracted to the practice of mediation? Or will the field also attract those who wish to practice mediation in order to expose a larger segment of the divorcing population to the perceived benefits of therapy?

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24 P. Ambrose, J. Harper and R. Pemberton, (1983): 73; C. Clulow and C. Vincent (1987): 165; G. Davis (1988a): 90; G. Davis, A. MacLeod and M. Murch (1982b): 40; K. Kressel and M. Deutsch (1977): 429; A. Mitchell (1981): 34; M. Murch (1980): 21-2, 35-6; Newcastle Report (1989): 294-295, 329.

Will mediation training programmes be able to overcome professional and personal pre-dispositions to assume responsibility for, and power and control over, others? Would the training programmes be able to do this if they somehow made personal attributes one of the entrance requirements? Or will, as B. Yngesson suggests,[25] more training tend to encourage mediators to emphasize the importance of their own professional expertise at the expense of the disputants' autonomy and power? We must leave these questions for future research. Here we can simply note that if mediation does not answer these questions correctly, it runs the risk of moving backwards. Mediation practised by those who are personally or professionally directive will quickly begin to look like an adjudicative process without procedural safeguards. Mediation practised by those who want to change or cure people or families will look like involuntary counselling, casework, or therapy.

Many of the practitioners who identified the importance of mediators being non-directive also viewed the assumption of the role of the 'expert' as a negative mediator characteristic. We may recall that in chapter 5 we saw that mediators who stressed the importance of the mediator's role as expert had trouble promoting disputant autonomy. Yet we shall see shortly that many practitioners identified 'professional objectivity' as a positive, personal mediator attribute. At first glance this may appear to be a contradiction. We must remember, however, that one does not need to exercise expert power in order to use a professional approach. In fact twenty-one of the practitioners identified both 'non-directivity' and 'professional objectivity' as positive mediator attributes. We shall discuss the latter attribute shortly.

Continuing our discussion of personal characteristics, we find that many of the practitioners mentioned the importance of empathy and warmth.[26] Again the

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25 (1990).

26 Comments included were: mediators need to be empathetic, sympathetic, warm, caring, compassionate, kind and understanding, able to establish rapport, not be cold or overly 'professional'.

practitioners' views are in accordance with the mediation literature[27] and with the views of mediators elsewhere.[28] We might note here that current research indicates that empathy and personal warmth may well be associated with mediator success and consumer satisfaction.[29]

In order to understand 'firmness or assertiveness', the personal characteristic next most commonly mentioned,[30] and to understand it's compatibility with 'non-directivity', we need to consider again the distinctions that we made between substantive and procedural mediator power in chapters 5 and 6. The practitioners were talking about mediators having the personal presence and the strength of character to be able control the mediation process. They were not talking about control over people, their families, or their decision making. For example:

> Although we want people with an air of authority, we don't want them to be too directive, or people who have rigid ideas and principles or people who are very dogmatic. (in-court conciliator)

> [The mediator must be] flexible but also very firm at times, not in an arbitrary way, but the mediator has to be in charge of the process. So you need confidence in yourself so that you don't get led off on a tangent. (out-of-court conciliator)

Table 8-3 tells us that thirty-nine of the practitioners mentioned 'professional objectivity'. C. Harrington and S. Merry (1988) found a high level of endorsement of this particular attribute by community mediators in the United States. The authors found that this endorsement was leading to a 'professionalization' of community mediation services, to mediation centres seeking the services of 'professionals', leaving those with close ties to the community on the periphery.[31] Some of Greater London's

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27 For others who have identified these traits as being important to mediators, see: S. Cretney (ed) (1986): 98; Frontenac Family Referral Service (1984): 19; J. Haynes, (1984): 501; H. Irving and M. Benjamin (1987): 93; M Knowles (1987): 62; D. Pruitt (1981): 215; V. Solomon (1982-3): 673.

28 J. Bercovitch (1984): 52-53; and G. Bierbrauer, J. Falke, and K. Koch (1978): 82.

29 See footnote 14 and chapter 6.

30 Comments included in the category: the mediator needs to be strong, assertive, firm, in control, decisive, and not wishy-washy, self-confident, able to confront people when necessary.

See also: T. Becker and C. Slaton (1987): 61; G. Davis and K. Bader (1985b): 85.

31 pp: 729-730. See also: B. Yngvesson (1990).

mediators argued, as we have seen, that the importance of this trait made 'professional' experience a necessary prerequisite to mediation practice. Others defined the attribute as a personal characteristic. In either case, what the practitioners were talking about was objectivity and personal detachment combined with empathy; a broader perspective than one based on one's own life experiences for understanding other people's problems; a realization that different people have different life experiences; and an ability to remain personally neutral in the dispute and its outcome.[32] Some comments from the practitioners might help to illustrate this attribute:

> A conciliator needs skills of communication, to be articulate. He would be patient, flexible, have a certain degree of warmth. It is sort of a package. [On the] negative [side] subjectivity: an inability to be objective; internalizing and looking at their own situation, their own divorce, their own children; the inability to detach themselves from that. And I suppose a lack of awareness - that comes into training - of the adjustment that is needed to go through a separation. (out-of-court conciliator)

> Most important is a caring person, compassion for other people, and I think an impartiality - to be able to look at the situation from both points of view. Sentimentality is the last thing you would want. You would need to be fairly analytical. Going back to what you shouldn't have: over involvement. (out-of-court conciliator)

> You mustn't get irritated - sometimes I feel myself do so - but it is very important. If you start to get irritated or cross you put yourself in their position in a way. You've got to be an objective person and not necessarily emotional. You mustn't project or judge people. So you really do put yourself in other people's shoes and see it from their point of view rather than from your point of view. (in-court conciliator)

The practitioners have identified something important but the question remains whether or not one needs 'professional'[33] experience in order to arrive at the same end. Might not life experience[34] and maturity combined with reading, or education and training, lead one to the adopt a similar approach? Many of the

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32 For discussion of the relationship between this concept and mediator neutrality, see Chapter 4.

33 I continue to use the term 'professional' in a general rather than in an academic sense. For an explanation, see chapter 3. See also chapter 10.

34 The term 'life experience' was used extensively by practitioners. It means simply personal exposure to and experience in dealing with a multitude of situations, people, problems, crises. It includes personal exposure to the problems of others.

practitioners identified the importance of 'life experience', particularly the experience of raising children, as an important positive attribute of the mediator. Might this provide an adequate replacement for 'professional' experience? Alternatively, we might ask if this is a characteristic acquired in 'professional' practice or a personal characteristic. Perhaps some people internalize other people's problems no matter how much 'professional' experience they have.

The practitioners stress the need for mediators to have an ability to understand and have empathy for the people on both sides of the dispute, an ability to remain professionally neutral to the people involved and to the decisions they make. When we look at the practitioner's views about the suitability of lawyers for mediation, we shall find the practitioners complaining about lawyers being overly partisan: blindly advocating one family member's position seemingly without concern for the interests of other family members; understanding issues in terms of right and wrong, black or white, or blame and fault, rather than in terms of adjustment, compromise and conciliation of perspectives; failing to understand that there are usually two legitimate sides to every dispute or conflict. Within the adversarial system lawyers have, inter alia, a duty to promote the interests and protect the rights of their clients. The system demands that lawyers offer protection and partisan support to clients.[35] It is important to consider whether the partisan, protective behaviour of the family lawyer derives from peculiarities of the legal profession or from the particulars of the legal process. Is it a reflection of the adversarial system, a personality trait common to all lawyers, or part of the ethos of being a lawyer? Only if it can be shown that the perspective originates from either of the latter causes do the mediators may have valid reasons for considering lawyers unsuitable for mediation.[36]

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35 For discussion of the role of the lawyer in family law disputes with references to some of research in this area, see chapter 9. See also L. Neilson (1990): 237-238.

36 We shall discuss the mediators' views of lawyers as prospective mediators in chapter 9. For the mediators' views on practising global mediation with lawyers, see chapter 7.

Let us leave aside the question of the suitability of lawyers for mediation for the moment, however, and continue our examination of mediator traits. Many of the practitioners identified the importance of mediators having self-awareness,[37] for example:

> As much as possible you must have self knowledge: why can't I cope with Mrs. Crumb, why do I dislike that man so much; and not think he/she should do this or that. The word 'should' doesn't come into mediation. Also the ability to sit and think about what you've said and done. And not do anything ever just because you need to be liked or approved of. (out-of-court mediator)

Table 8-3 tells us that flexibility (a lack of rigidity or idealism)[38] and listening skills were also endorsed by many of the practitioners,[39] as well as the need to have life experience:[40]

> You need to have gone out and lived. I've been a probation officer for years and I've had students, different sorts. I had a girl who had lots of degrees, including a Masters, and she was going directly from school into probation and I thought that was wrong. She was clever but she had not lived. So I told her to go out for two years and live and then come back. A mature person has much more to offer: one who has knocked about in life so there are gut reactions. (in-court-conciliator)

> I would not ever think of employing anyone under the age of thirty. That is not ageism but a simple recognition that you haven't experienced or haven't experienced often enough and that is awfully important given the weight of experience people throw at us and ask us to carry. (out-of-court conciliator)

The mediators mentioned in particular the importance of mediators having experience with marriage and children:

> [The mediator needs] to have been married, to have children, to be at least 40. You need more than that but those are the most important. (in-court conciliator)

While mediators generally thought that life experience, particularly experience in raising

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37 Included in this category were comments such as: mediators need to understand their own limitations, their own biases; to be self critical; to have humility and self awareness.

38 Other comments included: mediators must be lacking in prejudices, stereotypes, preconceptions and be able to keep an open mind.

39 See also: the surveys of T. Becker and C. Slaton (1987): 61, and G. Bierbrauer, J. Falke, and K. Koch (1978): 82; and the following authors: C. Moore (1986): 90; W. Maggiolo (1985): 141; V. Solomon (1982-3): 673.

40 See also: J. Pearson, M. Ring and A. Milne (1983): 20.

children, important, they were more cautious about the benefits of having experienced divorce:

> I don't go for the social work and caring profession perspective that you must have experienced [divorce] in order to be helpful. The fact that you have experienced and not resolved can be unhelpful. (out-of-court mediator)

> [*Are there any negative characteristics?*] ... People who have suffered traumas themselves and are in the process of working their own problems through. They might be the sort of person who in the sessions is saying, "When I was divorced" or "my child did this" or "my child did that". I don't think that is at all appropriate. (in-court conciliator)

Very few (3) mediators thought personal experience with divorce an asset to mediation. In fact fourteen expressed concerns about divorcees entering the field. The practitioners warned that those with unresolved problems stemming from their own separations and divorces, and those tending to analyze other peoples' separation and divorce experiences in terms of their own, might do disputants more harm than good.

The mediators may or may not be correct in this. G. Davis and M. Roberts (1988)[41] have found that some disputants are critical of their mediator's lack of personal experience with divorce. The perception that it is important for mediators to have life experience has some research support. It appears, from some of the social work and mediation research, that disputants or clients want the people assisting them to have had personal experience with the matters concerning them.[42] In particular those having problems making decisions about children want help from workers who have had children themselves.[43] No one has yet established that mediators who have children are more successful than those who do not. Is it important? Perhaps we ought to ask if one can develop a true understanding of parent/child love and bonding without personal experience and whether those without parenting experience can truly understand the

41 pp: 84-5.

42 See, for example: C. Clulow and C. Vincent (1987): 159, 166; G. Davis and M. Roberts (1988): 84-85; E. M. Goldberg and R. W. Warburton (1979): 17; M. Murch (1980): 49; J. Mayer and N. Timms (1970): 73; J. Pearson, M. Ring and A. Milne (1983): 20; S. Rees and A. Wallace (1982): 36.

43 See, for example: C. Clulow and C. Vincent (1987): 159, 166; E. M. Goldberg and R. W. Warburton (1979): 17; M. Murch (1980): 49; S. Rees and A. Wallace (1982): 36.

trauma and despair of others going through family re-organization. If disputant satisfaction with mediation is connected to the disputants' perceptions that their grievances have been fully aired and understood, as the research of J. Pearson and N. Thoennes, (1988b)[44] and D. Pruitt, N. McGillicuddy, G. Welton, and W. Fry (1989)[45] suggests, might not mediator life experience be important to disputants for reasons other than the mediator's dispute-resolution ability? although these questions cannot be answered here, the opinions of practitioners and consumers of legal and social-services cannot be lightly dismissed.

The intelligence trait noted in Table 8-3 is really a number of traits. Mediators commented that mediators need to be good lateral thinkers; to have clarity; to be analytical, imaginative, creative, logical, quick thinking; to have well-developed abilities at problem solving, concentration, and memory. For example:

> You need to be quite a lateral thinker as well. To be able to move people from one track to another and that is quite important. (out-of-court conciliator)
>
> And someone who is clear thinking, because amongst all this morass of emotion, distress, grief, - what mediators can do most fruitfully is to clarify what can be negotiated, to see clearly what it is feasible to achieve. And imaginative, to see what alternatives the parties haven't been able to clearly see or haven't looked at - to cast new perspectives on the situation. (out-of-court conciliator)
>
> Sometimes [you need] the ability of a juggler - to keep five balls in the air at a time because sometimes, when there is feeling one person is saying one thing and one person another. ... You can hold that one up there for the moment and say, "OK now I will deal with this particular ball," and so on. So clarity is important and being able to hold on to [remember to come back to] what people are saying. (in-court conciliator)

We find the same characteristics identified in the mediation literature.[46]

Nineteen of the practitioners mentioned the importance of patience and an equal number the importance of maturity and age; for example:

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44 p. 435.

45 pp. 368 to 393.

46 See also: M. Baker-Jackson et. al. (1984): 24; J. Bercovitch (1984): 110; G. Davis and K. Bader (1985b): 85; E. de Bono (1985): 114; L. Parkinson (1987e): 192; M. Roberts (1988): 66; G. Williams, J. England, et. al. (1976): 12.

> You are really talking about a broad band of say [people] from 30 to 60. Generally if you had too many people under that age of thirty, I think you would find that a lot of clients would feel that it [mediation] wasn't terribly helpful. It is a prejudice but it is there. When I think of all the adverse comments I've heard over the years from people about young social workers and 'what do they know about life'. .. In this job I don't think there is any substitute for life experience. Training is important but you have to have practical experience as well. [A mediator needs] maturity: chronological and emotional. (in-court conciliator)

In chapter 2 we saw that the majority of Greater London's mediation practitioners were fifty years of age or older. This may have predisposed many to assert the benefits of age and experience, although we can also find assertions of the importance of these traits in the mediation literature.[47] We can also find in the research literature indications that disputants and those otherwise needing assistance do not like to receive help from young workers.[48]

We find in table 8-3 that the other traits identified by ten or more practitioners were: intuition and perceptiveness; an ability to allow ambivalence; the absence of a need to fix things:

> And not to need to put it right, make it better. There are social workers who, when they do that, want to put the couple back together, make it all right; and really what you want to do a lot of the time is to help them separate. (out-of-court conciliator);

common sense[49]; neutrality;[50] the ability to withstand being confronted with high conflict levels and strong emotions[51]; effective communication skills[52]; and a sense of humour.[53] We can find assertions of the importance of most of these attributes in the

47 For assertions about the importance of patience, see: M. Baker-Jackson, K. Bergman et. al. (1985): 24; T. Becker and C. Slaton (1987): 61; J. Bercovitch (1984): 52-53; G. Bierbrauer, J. Falke, K. Koch (1978): 82. For assertions about the importance of maturity and age, see: C. Clulow and C. Vincent (1987): 166; G. Davis and M. Roberts (1988): 84-85; M. Murch (1980): 49.

48 For further discussion and references, see chapter 2.

49 Perhaps this category ought to have been included in 'intelligence'. Comments included were: the mediator needs to be realistic, level headed, not impractical. See also: T. Becker and C. Slaton (1987): 61

50 Refer to Chapter 4 for a discussion of the differences between 'mediator neutrality' and 'professional objectivity' and for references.

51 See also: G. Davis and K. Bader (1985b): 85; R. E. Walton (1969): 106.

52 See also: T. Becker and C. Slaton (1987): 61; L. Parkinson (1987e): 192; V. Solomon (1982-3): 673.

53 See also: T. Becker and C. Slaton (1987): 61; Frontenac Family Referral Service (1984): 19; W. Maggiolo, (1985): 174; D. Pruitt (1981): 204.

mediation literature.[54]

The fact that only eleven of the practitioners mentioned the importance of communication skills does not mean that practitioners considered communication skills unimportant. In fact, when we look at the education and training that the practitioners proposed, we shall discover that they considered communication skills to be vital. The reason the trait was not identified by more practitioners was that many classified 'effective communication' as something to be learned in training rather than as a personal attribute. Greater London's mediators did not mention honesty, integrity, and morality as often as have mediators elsewhere,[55] perhaps because the trait is assumed in England. In any event it was not of utmost concern.

Perhaps the mediators were identifying a form of interpersonal (as opposed to academic) intelligence or understanding.[56] We can place almost all of the attributes identified in Table 8-3 into four categories: respect for the individual and the rights of others to determine their own destinies and to make their own decisions;[57] the ability to provide structure and control;[58] self-knowledge and interpersonal understanding; and intelligence and common sense.[59] The mediators appeared to consider the first and the third the most important. Ten of the nineteen most commonly identified mediator characteristics can be placed in the third category; and only five of the 102 practitioners failed to identify a characteristic within one of those ten categories.[60] What the mediators appear to be saying is that one of the most valuable attributes a

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54 See footnotes 49 to 53.

55 T. Becker and C. Slaton (1987): 61; S. Cretney (ed.) (1986): 98; J. Pearson, M. Ring and A. Milne (1983): 20. Only two of Greater London's mediators mentioned these traits.

56 See also chapter 14.

57 This would include the characteristics of being 'non-directive', 'non judgmental', 'flexible' and 'able to allow ambivalence'. These were identified by 44, 36, 31, and 15 of the practitioners respectively.

58 This would include 'assertiveness/strength' and 'neutrality' characteristics identified by 40 and 14 of the practitioners respectively.

59 Different aspects of 'intelligence' were identified by 24 of the practitioners and common sense by 14.

60 Three of these five identified another interpersonal quality: that of genuinely liking people.

family/divorce mediator can have is an intuitive, as opposed to academic or quasi-scientific, understanding and appreciation of themselves and other people.

The attributes of self-knowledge and interpersonal understanding that Greater London's mediators identified seem to be particularly relevant to family/divorce mediation. In other forms of mediation, attributes such as: authority, stamina, persuasiveness, honesty and integrity, fairness, and independence are considered important, while many of attributes of the self-knowledge and interpersonal knowledge, with the exception of the ability to establish rapport, are considered less so.[61] This should not be surprising. While international, labour, community, and family/divorce mediators use similar processes and often similar methods and skills, the substance of the disputes they deal with are different. All mediators must occasionally grapple with high levels of conflict and emotional reaction, but when we move from international and labour mediation to family mediation, the substance of the disputes and the relationship between or among the disputants become increasingly personal, hence the increasing need for personal and interpersonal understanding.

In addition to endorsement of the need for self-knowledge and interpersonal knowledge and skills, we also re-encounter here practitioner endorsement of the need for mediators to respect and protect the autonomy of disputants. When the practitioners discussed the personal traits needed by mediators, they expressed it in terms of the mediator needing to be accepting of others, to have an open mind, not needing to control, dominate, impose, assume control, direct, moralize, judge, or fix people or families, or give 'expert' advice. In chapters 5 and 6 we saw how the importance of disputant autonomy influenced the practitioners' understandings of their own roles and responsibilities with respect to their primary professions, their responsibilities to children, and their attitudes towards the inclusion of therapy in mediation. Here we

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61 See, for example: J. Bercovitch (1984): 52-53, 81, 110; W. Maggiolo (1985): 73; I. W. Zartman and M. Berman (1982): 17-23.

find its influence on the personal characteristics recommended for mediation practice.

Summary and Discussion

Greater London's mediation practitioners did not think personal characteristics alone sufficient for family/divorce mediation practice. The vast majority (97.1%) of the practitioners stressed the need for mediators to have specialized education and training. This did not mean, however, that they considered personal characteristics unimportant. Almost one-half (45%) of the practitioners considered personal characteristics more important to the mediator than his or her substantive education or skills and techniques and few (16.3%) thought formal education and training, or the development of skills and techniques, more important to the mediator than his or her personal qualities.

Perhaps we need to look at this more closely. We saw that the research literature supports the practitioners' assumptions about the importance of the mediators' personal characteristics. Perhaps people should be chosen for mediation training on the basis of these characteristics, and not on academic or professional qualification. When we look in chapter 9 at the entrance requirements that the practitioners would impose on those wishing to take mediation training, we shall encounter a lack of consensus among the practitioners about which 'professional' backgrounds are appropriate. Furthermore, we shall re-encounter substantial practitioner support for the requirement that entrants have appropriate personal characteristics, and we shall find that many practitioners question the relevance of 'professional' training at all. Perhaps it would be more fruitful, assuming the development of suitable screening methods, to assess each prospective mediator's personal characteristics rather then his or her professional and academic qualifications when deciding who to admit into training. Perhaps the psychologists can offer some guidance.

When we looked at the nineteen personal characteristics that the practitioners most commonly identified, we discovered they fell within five major groupings: self

knowledge and intuitive interpersonal knowledge and skills; respect for the individual and the rights of others to make their own decisions; assertiveness or the strength of character to be able to provide structure and to control the mediation process; 'professional objectivity'; and basic intelligence and common sense. We might note that the last trait was mentioned by far fewer practitioners than the first four, perhaps because many practitioners felt interpersonal intelligence more important than academic intelligence. We also saw that the practitioners strongly endorsed the need for mediators to have respect for the individuality and autonomy of others. In fact more practitioners mentioned the need for mediators to forego directing or controlling others than any other single category. We find ourselves returning, therefore, to one of goals or attributes that the practitioners considered most important to the mediation process: that of protecting (within limits) the rights of families to make their own decisions, free from court or 'expert' coercion. We see that this aspect of mediation is, perhaps, mediation's most important single attribute; it is hoped it will not be lost with professionalization and the move to include finance and property issues in the mediation process.

In this chapter we have discussed the types of people that mediators hoped would provide mediation. In chapter 9 we shall carry this discussion a step further and examine the personal, occupational, and academic entrance requirements that the practitioners would propose for entry into mediation training programmes.

CHAPTER 9

The Selection of Mediators: Personal, Occupational, and Academic Requirements

Introduction

In chapter 8 we learned that, while the mediation practitioners thought it vital for family mediators to receive specialized education and training, they also considered the personal attributes of the mediator as or more important for effective mediation. Consequently we examined the personal characteristics that the practitioners thought necessary. Here we shall expand our examination of the question of who should provide mediation to include occupational and professional considerations. Some of the practitioners' comments about the personal qualities needed by the mediator will continue to have relevance here. If we are to evaluate the practitioners' suggestions for the future education and training of family mediators, we must know whom the practitioners envisioned allowing into the training programmes. In particular we shall need to know if the practitioners were making assumptions about the educational or occupational attributes that mediation students would possess before beginning their training.

We shall examine the practitioners' answers to a number of questions. Should entry into mediation training be limited to those with the personal attributes that practitioners identified in chapter 8? Should training be limited to those from the 'professions' that many consider to be collateral to mediation (social work, law, probation,[1] psychology, family therapy, counselling), or is professional background in fact a hindrance to learning mediation? Do mediation practitioners think legal and

1 In England most probation officers receive the same basic education as do social workers.

mental-health professional experiences suitable or unsuitable for mediation practice? We shall find the mediators evenly divided over the latter questions. We shall also find that the practitioners who sought to exclude non-professionals[2] from mediation, could not agree on which professionals to include or exclude. Furthermore, when we look at the mediators' comments about the suitability of various professional backgrounds for mediation, we shall find positive comments balanced by negative ones. When we turn to the literature we shall encounter similar problems. Most professional claims to family mediation appear spurious or weak. We shall uncover few justifications for limiting mediation training or practice to the members of any particular discipline.

Entrance Requirements: Does Mediation Need Professionals Or People?

In chapter 8 we saw that 83.6% of the mediators considered personal attributes equal to or more important than skills and techniques or substantive knowledge. We also saw, however, that a substantial number of the practitioners thought that, in addition to personal attributes, and education and training, mediators needed preliminary 'professional' experience. Let us examine these opinions in more detail, starting with **Table 9-1.**

TABLE 9-1
Mediation Training: Entrance Requirements[3]

	Mediators	Excluding Lawyers[4]
Mental-Health, Marriage Guidance, Social-Work only:	14	14
Some Professional Experience, not necessarily mental health:	39	3
Prior Professional experience not required:	47	4
TOTAL:	100	21

2 The terms 'profession' and 'professional' continue to be used in a general, non technical sense. For a definition of our use of the term, see chapter 2. See also chapter 10.

3 When the practitioners made a number of recommendations, they were classified in accordance with the least stringent educational or occupational entry requirement proposed.

4 The number of mediators in each group who said they would exclude lawyers.

Table 9-1 tells us that a small number of the practitioners sought to limit mediation training to members of the mental-health disciplines.[5] In addition to marriage-guidance counsellors and social-workers, the practitioners intended to include family therapists and court-welfare officers in this group. We find that many practitioners, however, would not impose disciplinary or professional entrance requirements at all, most of them preferring to rely on screening for personal characteristics.[6]

It is important to note at this point that many of the mediators were concentrating on child mediation when they discussed entry requirements. We shall remember, from chapter 7 that twenty-four practitioners were not in favour of global mediation. Others were thinking of their own mediation experiences (see chapters 2 and 7 and Appendix A-1) when they addressed this issue. Only one of the fourteen practitioners who wanted to limit mediation to those from the mental health fields, for example, was considering global mediation when proposing to limit mediation to mental-health practitioners. Many of the mediation practitioners' suggestions were not necessarily intended to apply to training programmes set up to teach financial and property mediation. Twenty-one of the practitioners did not want to admit lawyers into mediation training programmes. Thirteen were clearly considering only child mediation when they made the comment. The remainder had professional fears or they did not think lawyers could possibly have the personal qualities needed.

We learned in chapter 2 that most of Greater London's mediation practitioners were members of a mental-health discipline. We learned in chapters 2, 7, and Appendix A-1 that few had training or experience in financial and property mediation. To

5 The numbers of practitioners endorsing the need for professional backgrounds earlier and in this section will not, at first glance, appear to correspond. This is partly because the categories are different, for example we have separated the 'beginning mediators should already be professionals' into two categories here; and partly because we are now considering the comments of a larger number of interviewees. (In chapter 8 we could not classify the responses of twelve practitioners.)

6 Some of the members of this group did not specify what requirements they would propose in place of occupational or professional affiliation.

balance the mediators' views, therefore, we needed to look at family lawyers' opinions about mediator education and training. Our 1987 questionnaire survey of the members of the Solicitors' Family Law Association practising in Greater London[7] revealed that the family lawyers were alarmed about what they perceived to be a lack of education and training among family mediators.[8] The lawyers thought mental-health practitioners had the necessary educational backgrounds to mediate only minor disputes over children, such as disputes over the timing of visitation when visitation had already been agreed upon, but not disputes over children involving legal issues or family disputes over finance and property.[9] The majority of the lawyers thought that family lawyers had the basic education needed to mediate all issues, but most thought that lawyers should take additional training; and they seemed less sure of their own education in child than in the financial and property areas.[10] Most of the lawyers, however, did not suggest excluding non-lawyers from mediation training. Instead they suggested stringent training requirements.[11] While it is likely that professional protectionism and jealousies influenced both the legal and the mediation practitioners' entrance recommendations, we find here a willingness among the majority of the members of all of the disciplines to work together and to overcome professional differences through practice (see chapter 7) and education and training.

What, then, of the opinions of the minority? Did they in fact have valid reasons for wanting to limit mediation to people from particular educational or professional backgrounds? Let us consider the arguments that the mediation practitioners[12] presented in support of their views, starting with the fourteen who sought to limit entry to those from social work and related disciplines:

7 For particulars, See: L. Neilson (1990).

8 Ibid.: 245.

9 Ibid.: 247-9.

10 Ibid.: 247-8.

11 Ibid.: 260-1. See also chapter 14.

12 The lawyers responded by questionnaire. We do not know, therefore, the reasons the lawyers had for the views they held.

> A: We both assume that you wouldn't have people coming into this field without social work or probation experience. B: It is important to be a good sound social worker with a good grasp of interviewing techniques, a knowledge of human growth and development and over and above that, an understanding of how families work and function. ... A: They would have to have gained [those] skills and experience. .. (*What about Marriage Guidance counsellors?*) No, because it is voluntary and you don't need any professional qualification to do it.[13] No. I think you need to have a professional qualification. (two out-of-court conciliators)

> I would prefer it was done by professionally qualified social workers because it is such an important piece of work. [It has] got to have a high status in training so [that] it is taken seriously. (out-of-court conciliator)

Those practitioners who thought that mediation trainees should first have some form of 'professional' experience, although not necessarily in one of the mental-health fields, argued:

> [The entrants] should all be qualified 'professionals', in some 'professional' capacity. I don't think it matters what: lawyers, doctors, Citizen's Advice Bureau workers, social workers and even family therapists. ... I don't think it matters. They can be pathologists, engineers. ... Some of the best mediators on the course seem to be those who haven't established all their own theories of psychodynamics, counselling, or whatever. CAB workers are usually very good. They learn to discern issues clearly. (out-of-court conciliator)

> (Interview with four out-of-court conciliators) A: What I was worried about when we were going through your list [of possible subjects to be included in mediation training programmes] are people without [professional] backgrounds and what sort of education they would need before being let loose. ... Can people do this who are not professionally qualified? I think that is a question that needs to be answered. If you don't have a professional background you can't take family therapy . or you can't just be a lawyer by just deciding to do it. Why don't we see this as a specialized area? Why do we downgrade the whole field by saying it is something anyone can do with a bit of training. ... B: Let's look at [a particular therapeutic agency] and how it signs on people. The base line is that anyone can come [for training] so long as they come from a discipline with a code of ethics. .. Unless you have that it would be dangerous for anyone to call themselves a conciliator. ... A: What I would be against is having people only from the caring professions and that might exclude lawyers.

The practitioners' concern for 'professionalism' was partly a reflection of the perceived need for the 'professional' objectivity discussed in chapter 8. The mediators' arguments, however, also indicate of the pursuit of professional status and power. Does

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13 Most of the members of this group would not exclude marriage-guidance counsellors.

this fit with the goals of mediation that the practitioners identified in chapter 4, or with the role of the mediator discussed in chapters 5 and 6? We shall attempt to answer these questions during our discussion of the professionalization of mediation in chapter 10. For the moment we might note that professional status seems more relevant to the directive role of the expert than to that of the facilitator.[14]

Those who opposed imposing professional or occupational limitations on entry argued that:

> The difficulty is slipping into your social work hat when doing conciliation and the difficulty is divorcing yourself from your social work role - the reverse of what you [another colleague] are saying. It is getting out of the social work role into conciliation and I think some of the best conciliators are amateurs. (This quote of an in-court conciliator was taken from a joint interview with three conciliators)
>
> Some people take to it like a duck to water. [For some] it is natural, a gift. You may get someone else who comes along and needs feeding, or you may have someone who is too much of a counsellor ... So people who don't have professional backgrounds, .. can be very good and may even have fewer hang-ups than the rest of us. (In-court conciliator)
>
> [I would use] common sense [as an entrance requirement] first and foremost. ... I don't think you need an academic background to be a good conciliator. I can think of some women down my street who could conciliate with the best of people, because they are blessed with common sense and a sense of fair play. ... [*joint practitioner discussion of some of the personal attributes mediators need*] We seem to be moving towards a psychological strain. My guess is that some psychologist has dreamed up a test - of who can stand the stress. Maybe that [psychological testing] is what the criteria for selection should be, not only for the clients' sake but for the conciliators' as well. (in-court conciliator, taken from an interview with three in-court practitioners..)

If these practitioners are correct and if those with professional backgrounds do not make better mediators than those without, as appears to be the case at the moment,[15] the need

14 For discussion of the expert and facilitator roles of the mediator see chapter 5.

15 Currently the mediation literature indicates that professional background does not affect mediator success: SPIDR (1988): 13. While there appears to be a connection between mediator success and mediator experience with mediation, and also between mediator success and disputants' perceptions of mediator competency; the researchers have not yet been able to establish a connection between professional background and mediator success. (See chapter 8). These conclusions should be accepted with some caution, however, because the lack of connection is surprising, not because one professional background is necessarily better for mediation than another; but because one would have thought that a mediator's professional background would predispose him or her to adopt one rather than another model of practice. Certainly much of the mediation literature would indicate this to be the case, for example: R. Coombs

for 'professional' entrance requirements disappears (unless one continues to be concerned about professional status). We need further research in this area.[16]

It is important to mention the fact, however, that twelve of the practitioners who proposed training non-professionals said that these trainees would require longer training periods than those already professionally trained; for example:

> As things stand at the moment, if we take people who already have degrees, like law or social work, you can probably have a shorter orientation course. ... I suppose if someone came in cold - you've got to give them listening skills, communication skills, family dynamics. It is hard to quantify because also in issue is whether it is concentrated or spread out. (out-of-court conciliator)

> It [training of non-professionals] could be done through the national body - with recruitment based on personality types. Then you would be looking at three years of training which would include practical placement with different organizations already in the field, like ACAS. ... It would be better to have a network of high quality centers, with highly skilled people. But .. we are not very good in the way we are developing and in time that will just add to the dilution and death of the process. You couldn't train non-professionals in under three years, you couldn't begin to cover it. ... I'm not talking about professionalism. I'm not talking about that. But an awareness of the concepts and ways of doing things. ... You need to have a thorough understanding of what you are going into and then there is the training in the law. It all takes time. ... You need to be aware that different types of conciliation are needed with different sorts of problems and attitudes. (out-of-court conciliator)

The duration of mediation training required for non-professionals was an argument that many used to substantiate their opposition to the entry of non-professionals. It appears to be an important issue. On the one hand, those already having some of the substantive knowledge needed by mediators (we shall discuss the parameters of the substantive knowledge required in the ensuing chapters) will not need as lengthy a training course as those without that knowledge. On the other hand, if procedural skills are more important than substantive knowledge, as our discussions about the role of the

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(1984): 476; G. Davis (1983a): 10; Department of Justice (Canada) (1988b): 165-9; L. Girdner (1986): 23-7; N. Kaplan (1984): 48; A. Milne (1983): 17-22; B. Sheppard, K. Blumenfeld-Jones, J. Roth (1989): 187; L. Vanderkooi and J. Pearson (1983): 565; S. Zaidel (1988): 28-29.) For examples of mediators' professional backgrounds affecting the type of mediation practised, see chapters 3, 5 and 6 and Appendix A-1, particularly services 2 and 17. Surely all mediation models are not equally successful.

16 A. Milne (1984): 51-2. Refer also to the comments in footnote 15.

mediator in chapter 5 suggest, and if those from the collateral 'professions' have difficulty making the adjustment from expert 'professional' to facilitator, perhaps the interests of mediation would be better served by training non-professionals.

We shall discuss the practitioners' concerns about the difficulties that those with legal and social-work and mental-health backgrounds would have adjusting to the role of mediator shortly. In the meantime, we should note the practitioners' continuing emphasis on the importance of the mediators' personal attributes. Even those who proposed professional entrance requirements did not wish to negate the importance of those attributes. Many[17] (25) of the fifty-three who recommended limiting mediation training to those who were professionals[18] said that entrants should also be screened on the basis of personal attributes, for example:

> It would be extremely unlikely that people without professional training can become conciliators. Some people say you can take people off the streets and train them. I don't think so. I think it is a skilled job. You need professionals to start. ... I wouldn't like to be exclusive. I think there are a lot of solicitors who would be - ... I would be careful of lawyers, though there may be some who would be good. ... Yet ACAS does the job very well. So I wouldn't exclude any profession. ... I think there are people from all professions who are naturally born conciliators. .. I would [select candidates for mediation training by] interview[ing] people who have the natural ability, interview[ing] them a lot about their own prejudices and all the 'isms'. I would expect them to have a high level of awareness about their own prejudices and [to have] some sort of professional background. (out-of-court conciliator)

Of the seventy-two[19] practitioners who specifically proposed selection processes prior to entry into mediation programmes, fifty (69.4%)[20] proposed screening on the basis of personal characteristics. This mirrors the importance that the practitioners attributed to personal characteristics in chapter 8. The mediators offered a number of proposals for

17 The number of practitioners advocating the need for screening on the basis of personal characteristic would probably have been considerably higher had I directed the attention of all interviewees to the issue. Usually the recommendations were offered spontaneously.

18 See footnote 2.

19 One hundred practitioners specified the backgrounds they thought mediators should have prior to practice. Seventy-two specifically discussed the creation of entrance requirements for mediation training programmes.

20 Again, this number might have been higher had I directed all practitioners' attention to this possibility.

personal screening procedures, for example:

> Marriage Guidance has a long form and they go in very deeply into backgrounds but I think a better way to select is to have people in and talk in an informal way about their attitudes.[21] And also - a lot of people who do this have been divorced themselves, which may be a bad thing. They may have hang-ups - or it can be a great advantage to have been through it. ... [I would] plan to have a group discussion and then a group session with all of the selectors and then have all the selectors decide. If I were doing it, I would find out how they felt about not doing the things they liked to do - like counselling - to reinforce the differences, and to find out their understanding of what they understand a mediator or a conciliator is. (in-court conciliator)

> For instance, in Marriage Guidance, the selection is at the local level. There is a selection procedure which is a national procedure so before anyone gets to the training course they have been selected for the basic intrinsic things you are looking for. If they [a mediation service] thought at the local level that a person was suitable, perhaps they could do it like Marriage Guidance does. [The candidate] could sit in for a few sessions and decide whether or not this was for [them]. .. Then [they could] proceed to the training at the national level, at which stage there would be constant monitoring and then they would go back to work in their agency after that. ... Say it was done by NFCC if they had somewhere to go. Rugby[22] does weekends .. and there are assessments at all stages of people coming and if at any stage they don't look right, there are reports sent back to the local organization. So entry into training [doesn't] necessarily [lead to] training for the final thing. .. If it was going to be an intake into a Polytechnic course, I don't see you'd have any say as to who was taken in. They would all be taken in and assessed at the end. They would do the course and be assessed at the end on the basis of academic achievement. (*So the Marriage Guidance way is perhaps better?*) It seems to me to be a much better way. (out-of-court conciliator)

These processes beg the question of how to screen the screeners. We shall not compare or comment on the suitability of these processes here, leaving these practical issues to others. The important thing to note is the large degree of consensus among practitioners about the importance of mediators having appropriate personal characteristics. We should bear that consensus in mind as we examine the practitioners' views on the suitability of the collateral professions for mediation practice later in this chapter.

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21 Marriage Guidance, now 'Relate' did use an extensive assessment form but they also held group and individual assessments throughout the training process as the next quoted mediator tells us. See also: W. Dryden and P. Brown (1985): 303-315; J. Ross (1985): 149-150; N. Tyndall (1985): 91-112.

22 Rugby is the national training centre for Marriage Guidance counsellors.

Mediation And The Collateral Professions: The Fight For Ownership

We have seen that the reasons some mediators gave for wanting to limit mediation to members of the collateral professions were weak and often not in accord with the roles and goals of mediation they identified in chapters 4, 5, and 6. We have not yet examined the relationships between the collateral disciplines and mediation. Perhaps we shall encounter more persuasive arguments when we do so. Let us first consider some of the mediation literature in this area.

In chapters 4, 5 and 6 we looked at some of the major schisms in the family mediation field: the expert advisor versus the facilitator; the child advocate versus the promoter of disputant autonomy; the therapist versus the dispute resolver. We wondered if these professional interests would threaten disputant autonomy in the mediation process.[23] The mediation literature is rife with claims of the members of various 'professional' groups that their group, and sometimes even their group alone, has the expertise or theoretical foundation needed to practice family mediation. We can draw examples from lawyers,[24] social workers and family therapists,[25] and others.[26] Some of Greater London's mediators expressed their concern with this development:

> I find the politics of this [mediation] really demoralizing. I find the politics of different groups looking after their interests demoralizing: that there are corners with each profession looking after their corner of the profession; and that each one thinks [it should be] their way and their style and that the others shouldn't be in. It is quite disconcerting. (out-of-court mediator)
>
> The major thing is to get a wider understanding of what sort of training is needed. There is a struggle going on at the moment between people who do family therapy and other people who take the ACAS model of pure negotiation. Somewhere in the middle of that there is a training

23 See also: G. Davis (1983a).

24 For example: A. Cornblatt (1984-5): 100-7; A. Pirie (1985): 380-1; L. Silberman (1982): 123; G. Walsh (1987): 7; J. Westcott (1986): 3347; N. Wilkins (1984): 123.

25 For example: N. Brown and M. Samis (1986): 51-67; T. Fisher (1986b): 2; H. Gadlin and P. Ouellette (1987): 101; D. Howard (1987); J. Howard and M. Jones (1987): 70; H. Irving and M. Benjamin (1987); J. Lemmon (1985a): 106; L. Parkinson (1985b): 250-60; M. Robinson and L. Parkinson, (1985): 358-66; Newcastle Report (1989): 43; G. Sargent and B. Moss (1986-7): 88-99; R. Stuart and B. Jacobson (1986-7): 73-9; J. Walker (1988): 240-269.

26 For example: L. Kiely and D. Crary (1986): 37; National Marriage Guidance Council (NMGC) (1982): 112; NMGC and NFCC (1986).

> programme which must include the divorce adjustment process. ... I think there is a great gap between where we should be and where we are at the moment. ... I don't think we have yet begun to understand the nature of what [education and training] is needed. There is an understanding but it isn't uniform and there is this struggle going on between the various [professional] groups as to what sort of training should be developed. ... I don't think there can be [standardization] unless there is a national organization which is [properly] funded. ... But [even then] all the time there are inputs from all the organizations who are putting forward their views about conciliation. And in the end conciliation will go to the elephants' graveyard, as an idea which didn't work out, while in actual fact [it's] potential is enormous. Conciliation needs to resolve these differences before it can move on. The problem isn't so much in the organization but in understanding the concept. (out-of-court conciliator)

The 'elephants' graveyard' is a real danger for mediation. Professional claims may undermine the cohesiveness and strength that mediation needs if it is to become a true alternative to the adversarial process.

When we examine the claims of those espousing the importance of their own profession's knowledge in the mediation literature[27] we find a number of holes in the arguments. Many of the claimants talk either about using the processes of their primary 'professions' in mediation or about using mediation techniques in their primary 'professions' but not about mediation *per se*.[28] We saw some of the problems that flow from this when we looked at mediation and family therapy in chapter 6. Other authors staking professional claims incorrectly attribute ownership of dispute-resolution techniques to the disciplines or perspectives within which they originated. We looked at some examples of this error in chapter 6. Still other claimants identify similarities between their own professions and mediation in order to support their claims.[29] For the fallacy of this argument, we need look no further than D. Saposnek's article 'Aikido',[30] in which he illustrates the similarities between mediation and the martial art of Aikido. Surely no one is going to argue that mediators all need to be trained in, or that

27 See footnotes 28 and 29.

28 For example: J. Amundson and L. Fong (1986): 68; I. Falloon, 'Behavioral Family Therapy' 119; Family Law Bar Association (see chapter 3); J. Howard and G. Shepherd (1987); L. Gordon (1985): 66; J. Pugsley, J. Cole, G. Stein, and E. Trowsdale (1986): 164; S. Zaidel (1988): 28-29.

29 For example: I. Falloon, 'Behavioral Family Therapy': 119; L. Gold (1982): 45; D. Howard (1987); D. Shearer (1990): 6.

30 (1986-7): 119.

mediation is derived from, a martial art.

We might expect all 'professions' to change according to the changing demands and needs of clients and society. Just as lawyers are becoming interested in the use of conciliatory dispute-resolution techniques in their family law practices,[31] so also can we expect to see changes in the practices of family therapists, social workers, and court-welfare officers as they respond to the same social influences. No doubt many now include aspects of mediation in their respective practices.[32] But this does not mean that mediation is therapy or social-work or marital counselling, any more than it is the practice of family law. More likely this is a reflection of mediation's influence on other 'professional' practices.

We remember from chapter 2 that the majority of Greater London's mediators had a primary occupation or profession outside mediation. It seems relatively safe to assume that mediators will use methods drawn from their primary practices of: law, social work, psychology, court-welfare, or therapy, until they have learned new methods from mediation to replace them.[33] Is this appropriate? Are the collateral professions and mediation similar? Are the methods and perspectives of these professions compatible with mediation practice? In the sections which follow we turn to an examination of the practitioners' views on these issues.

Mediation And The Collateral Professions: Are They Compatible?

Mediation And The Practice of Law

First let us consider the suitability of lawyers for mediation from the perspective of those already in the field.[34] It is important, when we discuss the practitioners' views, to

31 See, for example, R. Benjamin (1989): 51; L. Neilson (1990).

32 See, for example, the authors cited in footnote 28 and M Bautz (1991): 211-23.

33 See footnote 15. See also chapters 11 and 12.

34 As this study is of the views of the mediators, the discussion will focus on the problems mediation practitioners anticipated for lawyers wishing to enter the field. Consequently we shall not be looking at the professional problems arising from within the legal profession in any detail. Some of these potential problems come readily to mind, for example: problems with the profession's conflict of interest guidelines, (in England the Law Society has recognized the need for solicitors who are acting as mediators

keep in mind the professional and educational profiles of the practitioners. In chapter 2 we saw that most (81.5%) of the mediators practising in Greater London during 1987 and 1988 were from the one of the social-work or mental-health 'professions': social work, probation,[35] family therapy or marital counselling. Very few were lawyers. In chapter 7 we learned that, while a substantial number of the practitioners were uneasy about lawyers becoming mediators, the majority did not wish to exclude lawyers from the field.[36]

The first thing we notice about the practising mediators' attitudes towards lawyers as mediators is the fact that many did not understand what family lawyers do. Erroneous and negative views of lawyers are abundant and obvious throughout the mediation literature.[37] Some of Greater London's practitioners shared these views and consequently made some extreme and biased comments, for example:

> I'll tell you what annoys me most. Joe Block and Joan Block decide to get a divorce. They both go and see a solicitor. One will play up with the other, demand more: "What about that stamp collection of his?". They have no regard for people's feelings, collect a very hefty fee and play one off against the other. (out-of-court mediator)

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and those acting as solicitors to adhere to different conflict-of-interest guidelines: L. Parkinson, 'Co-mediation' (1989): 136); problems with the duty of lawyers not to divide fees and professional power with other professionals; and problems with the duty of lawyers not to encourage or participate in the practice law by non-lawyers. Lawyer mediators will also have to clarify their roles. For example, when a lawyer mediates is he or she acting as a mediator or as a lawyer? Which standard of care does one apply? What duties will the lawyer mediator have to ensure that there has been full and complete disclosure of the disputants' financial affairs? (see: American Bar Association (1984a): 366; L. Silberman (1988): 361) What duty will the lawyer mediator have to ensure that the agreements reached in mediation are within the normal range of decisions the court might make in similar situations? (See, for example: G. Hufnagle, 'Malpractice' (1989): 33.) If the English courts were to impose upon English lawyer mediators the same or similar duties as those indicated in the dicta of Camm v Camm [1983] 4 FLR 577 [but see: Dutfield v Gilbert H. Stephens & Sons, as cited in Family Law 18 (1988): 473] lawyers in England would clearly have difficulty fulfilling a mediator's role). If during a mediation session a disputant discloses child abuse, is the lawyer bound by solicitor-client privilege or must (s)he disclose the communication pursuant to his or her professional duties as a mediator? For further discussion of some of these issues see, for example: R. Crouch (1982): 225-250; A. Pirie (1985): 378; L. Riskin (1982): 29; J. Ryan (1986): 105; L. Silberman (1988): 359.

35 Most probation and court-welfare officers receive the same basic education and training in England as do social workers.

36 See also: A. Elwork and M. Smucker (1988): 21.

37 Many articles promoting mediation contain assertions about the horrors of lawyers and the adversarial system. For two extreme examples see: H. Irving and M. Benjamin (1987): 39: 'The tendency for lawyers to promote increased conflict between spouses and to prohibit them from seeking non-adversarial solutions is well known'; and D. Brown (1982): 4-11.

> But they always squeeze as much as they can out of the clients, don't they? I know that is a very blanket view, but they are scraping the bottom of the pot. They are getting what they can out of the pot without opposing conciliation. (in-court conciliator)

Before we can begin our discussion of the mediation practitioners' attitudes to family lawyers as mediators, therefore, we must first review the socio-legal literature to ascertain what family lawyers actually do and how their activities are different from those of family mediators.[38] In the current enthusiasm for alternatives to the adversarial process it is often forgotten that, although family lawyers do not usually use mediation as a method, they do use and have used for some time other methods of dispute resolution to settle most of their family law cases. Approximately ninety percent of all family cases are settled by the parties or by their lawyers without trial.[39] The courts hear and decide only a small minority. Lawyers' settlement rates compare favourably to those of mediation services.[40] Furthermore, contrary to allegations that lawyers fan the

38 Much of the material that follows has already appeared in published form: L. Neilson (1990): 236, 237-8.

39 See for example: T. Bishop (1987): 12; Department of Justice (Canada) *(1988b)*: 268, 301; R. Dingwall (1986b): 75; J. Eekelaar (1982): 63; The Law Commission (1986): 20; S. Maidment (1976a): 237, (1984): 68; H. McIsaac (1983): Appendix; A. Mitchell (1981): 15; J. Payne (1986a): 38; Report of the Interdisciplinary Committee on Conciliation (1983): 6; R. M. J. Werbicki (1981): 485. See also L. Neilson (1990): 240.

It should be noted here that many cases, perhaps as many as 60% of them, are settled by the parties through bilateral negotiation without much assistance from lawyers or anyone else. See, for example: Appendix to H. McIsaac (1983): 57; R. Cavenaugh and D. Rhode (1976).

40 K. Kressel (1987): 220. After reviewing the mediation literature, Kressel concluded that mediation settlement rates of 40-70% appear modest in comparison with the 90% settlement rates in the adversarial process. See also footnote 39. One must be cautious when looking at comparisons of the adversarial process and mediation services in the mediation literature. The H. Irving et. al. study, for example, which is partially reported in: H. Irving (1980) and H. Irving and M. Benjamin (1984) compared clients going through the adversarial system voluntarily and involuntarily to those who had been assigned to mediation *and* had voluntarily accepted the process. Prior to imposing the condition of voluntariness, the agreement rates in the mediation group were disappointing. In the J. Pearson and N. Theonnes study (1984b): 248, 33% of the adversarial control group were dropped because by the time of contact they had already resolved their conflict or had reconciled (using adversarial processes)! Inclusion of this group in the control group's agreement ratings might have lead the researchers to very different conclusions from the ones reached. It would have also brought the agreement ratings in the study's adversarial control group in line with the non-mediation studies. The J. Kelly et. al. (1988, 1989) studies compare disputants who choose mediation voluntarily and who had reached an agreement in the process, to people who had been through the adversarial process and who agreed to participate in the study, whether or not they had reached an agreement in the process. The Department of Canada (1988a, b, c,) and the Newcastle Report (1989) studies found few measurable differences between the two processes.

A combination of the two systems does, however, appear to have a positive effect on agreement rates: G. Davis and K. Bader (1983d): 10. The fact that agreement rates may be higher when an

flames of conflict,[41] the little research we have[42] on what lawyers actually do indicates that most family lawyers encourage settlement.[43] They also provide personal support and counselling to their clients.[44]

This does not mean that the dispute resolution methods used by lawyers are necessarily the most efficient or that there is no room for improvement. While mediators try to help disputants design their own agreements to meet their own special needs and interests by means of a co-operative process, lawyers tend to use competitive, power-balancing methods. Furthermore, lawyers usually assume most of the responsibility and authority for the decisions to be made.[45]

If family lawyers resolve disputes, encourage settlement, and provide personal support and counselling services to their clients, what do mediators do that is different? Some people would argue that what family lawyers do is actually a form of mediation. Ten family lawyers in Greater London who responded to the SFLA survey spontaneously made this comment.[46] They are not far wrong if we adopt the Finer definition of mediation:

> ...assisting the parties to deal with the consequences of the established

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adversarial approach is used may not, however, accurately reflect the true situation. As H. Irving (1980): notes, agreements reached in the adversarial system may have been reached after a lengthy period of time, after much cost and after many interim proceedings (one or two years of proceedings instead of two to four hours of mediation appointments). It is also questionable that many of the adversarial agreements are true agreements. Lawyers often agree on what they think is reasonable and then sell it to their clients: T. Bishop (1987); H. Erlanger, E. Chambliss and M. Melli (1987).

41 See footnote 37.

42 R. Dingwall (1986b): 74-5.

43 a. See, for example: I. Baxter (1979): 199; G. Davis (1988a): 85-126; G. Davis, A. MacLeod, and M. Murch (1982): 40; Department of Justice (Canada) studies (1988a,b,c); H. Erlanger, E. Chambliss, and M. Melli (1987): 591-603; W. Felstiner and A. Sarat (1988) 23; A. M. Hochberg (1984); R. Ingleby (1986): 57, (1988): 43, (1989): 230; K. Kressel (1985): 284; G. Williams (1983); H. O'Gorman (1963); A. Sarat and W. Felstiner (1986): 93.

b. Other studies have emphasized the minority of family lawyers who are not conciliatory: A. Manchester and J. Whetton (1974): 339; P. McKenry, M. Herrman and R. Weber (1978); R. Cavenaugh and D. Rhode (1976): 103-184.

44 See: G. Davis (1988a): 85-126; J. Falke, G. Bierbrauer and K. Koch (1978): 104; R. Cavenaugh and D. Rhode (1976); and P. McKenry, M. Herrman and R. Weber (1978).

45 G. Davis (1988a); H. Erlanger, H. Chambliss, and M. Melli (1987): 585; W. Felstiner and A. Sarat (1988): 23; and A. Sarat and W. Felstiner (1986): 93.

46 L. Neilson (1990): 237.

> breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consents or reducing the areas of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers fees, and every other matter arising from the breakdown which calls for a discussion on future arrangements.[47]

Most people, however, would argue that there are fundamental differences. Within the adversarial system lawyers negotiate for the clients, thereby controlling the pace and often the substance of the dispute-resolution process.[48] Within the mediation process the disputants negotiate directly with each other. Responsibility for resolution remains with the disputants and is not given to the mediator: the mediator merely facilitates the communication and negotiation. One solicitor with mediation experience explained the difference as follows:

> There is an enormous difference. As a solicitor you can suggest things and as a solicitor, I have ... developed a role of being extremely directive. You argue for a view with your client and you then adapt the view slightly and argue with the other side and between the two of you, you manage to reach some sort of accommodation. It is all about fixing. In calling it fixing, I don't mean to denigrate it because I think it is better that the parties have their dispute fixed rather than have huge bloodletting enquiries conducted in an adversarial fashion in front of the court; but it is a different creature from settlement in mediation, where the aim is not to be directive.

Within the adversarial process the lawyer is the expert. He or she often decides what is best for the client and then advises (or directs) the client to accept that decision. Although in practice some mediators approach the directivity of lawyers in pushing for the adoption of their own ideas of what is best for the family and particularly for children,[49] in theory the mediator ensures that the disputants create their own resolutions.

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47 Finer Committee, Report of the Committee on One-Parent Families, Cmnd 5629 (London: HMSO 1974): para 4.288.

48 See footnote 45.

49 See, for example, the research of: G. Davis and K. Bader (1983c): 403; R. Dingwall (1988): 150; J. Folger and S. Bernard (1985): 5; D. Greatbatch and R. Dingwall (1990): 53-64; K. Slaikeu, R. Culler, J. Pearson and N. Thoennes (1985): 63; L. Vanderkooi and J. Pearson (1983): 565. For some examples of directive behaviour drawn from the written work of practising mediators see: H. Irving and M. Benjamin (1987): 125; L. Marlow (1986): 92-3; M. Samis and D. Saposnek (1986/1987): 33-34. See also chapter 5.

M. Eisenberg[50] suggests another distinction. He argues that both courts and lawyers tend to give only secondary importance to person-oriented norms. Thus the adversarial process and lawyers' negotiations tend to be rational and rule-governed; mediation is more accommodating to personal norms and values. Another difference concerns the person or persons that the mediator and the lawyer serve. A solicitor-mediator commented:

> The lines [between mediation and acting as a solicitor] blur a bit. I think [that] in my adversarial practice I practise in a way which is similar in outlook to mediation except that I have to take one person's side and I have to end up putting his or her case and that is different, a qualitative difference, from working with people together and helping them to find their own positions.

The lawyer has a duty to serve the interests of his or her clients, subject only to his or her professional obligations to the legal profession and the courts. Mediators, on the other hand, envision their own role as serving the needs of the parents, the children, or the family as a whole (depending on the case under consideration and the mediator's professional orientation). Although many lawyers see themselves as working towards agreements that are fair to both sides,[51] the fairness emanates from controls within the legal process that seek to ensure the fair balancing of competing interests. It does not occur because lawyers have any duty to their client's spouse. Some other differences have been suggested, i.e.: lawyers focus on the individual while mediators focus on the family; lawyers focus on the past while mediators concentrate on the future; lawyers use competitive negotiation methods while mediators encourage the use of co-operative ones.[52]

Thus, while it is certainly not true that family lawyers escalate and promote conflict and have no consideration for the emotions and feelings of their clients, it is

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50 (1976): 637.

51 K. Kressel (1985): 140; O'Gorman (1963).

52 For further discussion of these and other distinctions, see: D. Brown (1982): 1; G. Davis and M. Roberts (1988); E. Koopman and E. J. Hunt (1988): 384; H. McIsaac (1983): 49; S. Roberts (1983): 537; J. Ryan (1986): 105.

true that they offer partisan support to their clients; that they tend to assume control of their client's affairs in their efforts to protect their client's interests; and that they can be directive while they are being supportive.

It is also important to remember that, at least to a certain extent, the practices and attitudes of family lawyers are changing in response to changes in society and in accordance with changes in the practices of the courts. We already have research indicating that family lawyers and mediators now have similar outlooks and objectives.[53] Sixteen of the mediation practitioners in Greater London spontaneously, without solicitation, mentioned the change in the behaviour of lawyers. They often attributed it to exposure to mediation:

> I think the best thing that has come out of our in-court-conciliation scheme is not what we are doing but what we are presiding over - an attitude of mind. We remind everyone that this is what is expected of solicitors out there and very often they come in and report their progress to the court and you sit there and you have these guys whistling in and out saying, "We are almost there, almost there," and you think who is the conciliator here? We are watching them do it and some of them are awfully good. The whole atmosphere is different. So now we are beginning to see them start one stage back. They do it in their first letters and this lowers the temperature no end ... It is not so much our 50 minutes but the attitude which has changed. ... The biggest change I've seen is that the conciliation movement has done a lot of that...(in-court conciliator)

No doubt the practitioners were at least partly correct[54] but there have also been other changes in family law which have probably also had an effect.

One of these has been the movement of the law away from consideration of parental rights to consideration of parental obligations and the focus on the best interests - increasingly on the rights - of the child.[55] It is likely lawyers will reflect the law's changing preoccupations. If so, we might also expect them to reflect current judicial

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53 Department of Justice (Canada) (1988a): 69, (1988b): 182, 185, 194-5; M. Murch (1980): 223.

54 See also: G. Davis (1988b): 103; Department of Justice (1988c): 76.

55 R. Abella (1983): 444; Children Act (1989): particularly s. 1, 2; S. Cretney (1984): 323-4; J. Eekelaar (1986): 168-180; B. Hoggett (1982): 411; Family Law (1986): 52, 56; C. Lyon (1989): 49-50; S. Maidment (1980): 433; Matrimonial Causes Committee (1985): 13; J. Orbeton, comment, (1987): 86; M. Rutherford (1986): 2969.

trends to seek solutions from those with counselling, social work, therapy, psychology, and psychiatric backgrounds.[56] We might also expect to see more emphasis among lawyers on the interests of children. These changes may also lead to some of the educative changes we shall find mediators suggesting throughout this section. These changes do not, of themselves, however, alter the ways that family lawyers view and attempt to resolve conflicts, nor the ways that they interact with their clients. We shall find that it was these aspects of being a lawyer that most concerned the mediators. We turn now to an examination of the mediators' concerns.[57]

Thirty-five of the practitioners said that they were concerned about lawyers becoming mediators because they thought lawyers tend to be overly partisan in the ways they understand and attempt to resolve conflict. The mediators argued:

> What would be very helpful initially is if they [lawyers] were more aware of the fact that there are two sides to every story. There is almost a built in criterion that you believe your client full stop. Having said that, it is a somewhat unfair criticism because your primary responsibility is to help your client. (in-court conciliator)

> [interview with two in-court conciliators) No.1: Sometimes they forget that their clients are human beings. No.2: Or that their client's opponents are human beings. No.1: It all becomes black and white, winning and losing, almost like a mathematical problem: there is always a legal answer. No.2: Or someone is always right and someone is always wrong. No. 1 and 2: It is an attitude, rather than skills [that lawyers lack].

> Their stumbling block is their whole training is adversarial and it is hard to get out of that. If you learn and you have always practised with a view to winning for your client right or wrong, it must be hard to get out of that. (out-of-court conciliator)

When we looked at personal characteristics in Chapter 8, we found that the practitioners stressed the importance of 'professional objectivity'. We saw that this trait included the ability to understand and empathize with the people and their positions on all sides of

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56 P. Ash and M. Guyer (1986): 554; C. Barnard and G. Jensen (1985): 69; Children Act (1989): s.7; D. Fraser: 13; Home Office Statistical Department (1984); A. James (1988b): 58; A. James and K. Wilson (1984): 89; R. Levy (1985): 485; Stephenson v Stephenson [1985] FLR 1140; N. Stone and L. Shear (1988): 55; E. Szwed (1984): 268; I. Thery (1986): 348, 353; M. Wilkinson (1981): 4.

57 We shall discuss the practitioners' concerns in order of the frequency of comment and shall discuss only those comments made by ten or more practitioners.

disputes/conflicts. That trait and the trait of being 'non-judgmental' appear to contradict the description of lawyers here.

Practitioners (thirty-three) said they were concerned because they thought most lawyers lack an understanding of the developmental and emotional needs of children:

> It seems to me that they [lawyers] get taken in with the battle, who wins, and they lose sight of the individual involved and the children. So they should know about the needs of children and the effects on children of the battle and being in the middle of the battle. (out-of-court conciliator)
>
> Nor can you expect all lawyers to have much knowledge about children or the developmental needs of children. .. If there was specialized training for family lawyers it jolly well should include training on the developmental needs of children but not for lawyers generally. (out-of-court conciliator)

One might argue that this is a biased view and that family lawyers do, in their family-law practices, gain an adequate understanding of children's needs; but many lawyers question their own competence in this area.[58] We also find the practitioners' concerns reflected in the mediation literature.[59]

We should keep in mind the goals of mediation discussed in chapter 4. There we saw that many of the practitioners identified the promotion of the best interests of children as one of the most important goals of the mediation process. It is not surprising, then, to discover that many mediators were concerned about lawyers' lack of education in this area. In Chapter 2 we learned that the majority of the practitioners had considerable education or had done a considerable amount of reading in this area. When we examined more closely in chapter 5 the role of the mediator with respect to the promotion of the interests of children, however, we saw that the goal of promoting the best interests of children appeared to be tempered by that of protecting disputant

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58 Solicitors In Mediation, 'Proposal' (1987): 1; L. Neilson (1990).

59 For some of the authors who have argued that family lawyers, particularly those who would wish to engage in mediation, need to gain some education in this area, see: B Ahier (1986): 9; G. Godfrey (1975): 26, 49; K. Kressel (1985): 165; M Oddie (1986): 374; J. Saposnek (1983): 281; L. Taylor and E. Werner (1978): 31; Working Party on Marriage Guidance (1979): 66-67.

autonomy. We also saw that most practitioners did not think it was the role of the mediator to act as expert, child advocate, therapist or psychologist. All four would need to have more substantive knowledge about children than would a person whose role was to help the parents negotiate with each other about the future care of their own children, although even the latter would need some knowledge. Lawyers who wish to practice mediation of child issues, or to include child mediation in their global mediation practices, will not need the depth of knowledge about children needed by a child psychologist or therapist, but the comments of the practitioners would certainly suggest that they will need some knowledge or education and training in this area. We shall be exploring the parameters of the knowledge of children that the practitioners recommended for fellow mediators in chapter 12.

Twenty-seven of the practitioners were concerned that lawyers seem to lack an understanding of human development, human behaviour, and the emotional components of conflict:

> Conciliation is counter productive to a lawyer's work and income. The Bar as such absolutely hates conciliation and cannot even distinguish between conciliation and settlement outside the doors of the court. They have absolutely no idea. There are just some who are just starting to understand that there might be emotions involved and maybe that after the court hearing the barrister should not say, 'I've done my bit' and walk away - instead of staying another 10 minutes and explaining what had happened and holding his or her hand if necessary. The Bar is totally against conciliation in the true sense of the word. They just pay lip service. (out-of-court conciliator) [60]

> [Lawyers lack] the whole emotional side of the process - there are individual exceptions - but, as a group, and as a generalization, they [lawyers] are not sufficiently aware of the emotional aspects. (out-of-court mediator)

> I have experience from going through a divorce myself. They only think

60 We do not know whether or not this practitioner's perceptions are accurate with respect to barristers. Certainly I formed the same general impression when in England during 1987 but this was a general impression only, one that was not based on research. It does appear, however, that the solicitors, at least SFLA members, were sympathetic to mediation and to non-adversarial forms of dispute resolution: L. Neilson (1990). If the two branches of the legal profession do in fact see the situation differently, perhaps this is because solicitors have more personal contact with clients and so tend to gain a greater understanding their clients' personal problems.

> of the situation in terms of the law and not in terms of how people feel. They are not trained for that. ... Solicitors can't cope when [clients] burst into tears in the office. They don't understand what they are going through. If you are going to specialize in divorce it would be very helpful if lawyers took a course on the stresses and strains of going through a divorce. ... They are not caring people. They are not there to be caring. My next [lawyer] was very capable but I can't say he was a caring man - when they cracked up in his office he ran out - but he was very capable. (out-of-court conciliator) [61]

Practitioners' complaints about family lawyers' limited understanding of the true dimensions of conflicts and disputes in family law were common. The mediators thought all family lawyers, not only those who would wish to practice mediation, should receive cross-disciplinary education on the social and psychological components of family breakdown and re-formation.[62] We find similar recommendations in the literature.[63]

Twenty-six of the practitioners said they were concerned about the difficulty that lawyers would have abandoning their adversarial natures, their tendencies to escalate conflict:

> There seem to be some solicitors who seem to delight in pushing couples further and further apart, polarizing couples with correspondence, with very cold and legal jargon. [They have] no more idea of human relations than flying over the moon. They would need a lot of training in that. (out-of-court conciliator)

> We had a work shop with solicitors and it worried me because it [mediation] needs a very particular type of person. They are adversarial. They are there to do the best for their client. It must take a tremendous reversal. We did a role play.[64] There was one chap in particular - an agreement of access was reached between the parents - and this solicitor said he could have got much more if he went to court and he said it several times. We tried to argue with him: that if it was good for the two

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61 Many would argue that, in order to be a competent family lawyer, one must understand and be able to deal with the emotional components of the divorce process.

62 This understanding should make lawyers more sensitive to the depth of their clients problems and give them better understanding of the services other professionals can offer. Even the few remaining adversarial family lawyers will need an understanding the behavioral sciences, however. Courts are increasingly relying on expert opinions from social workers, psychologists and psychiatrists (for references, see footnote 56). Lawyers consequently need to understand the limits of the expertise of these disciplines and also how to analyze and evaluate research from the social sciences in order to properly prepare their cases and their cross-examinations. See, for example: N. Stone and L. Shear (1988): 64; N. Zaal (1985): 559.

63 See also: G. Davis (1988a): 89-115; A. Gerard (1984); M. Murch (1980) 18-39; V. Solomon (1982-3): 672.

64 The mediator is talking about taking part in acting out a hypothetical mediation session.

> of them, then it was good for the children and that it didn't matter what their rights were as long as the parents agreed - but he couldn't get over that and I thought, I don't suppose he was atypical. (out-of-court conciliator)

As we have pointed out, the perception that family lawyers promote and escalate conflict appears to be erroneous. The research suggests, however, that the perception may apply accurately to a minority of family lawyers.[65] The practitioners warn us this minority will have to abandon their perceived tendencies if they hope to become mediators - if mediation is to survive as a process that is fundamentally different from the adversarial process. We might expect the majority of lawyers, particularly those with the personal attributes discussed in Chapter 8 and who practice family law in an non-adversarial manner, to find the transition from law to mediation less difficult. For example:

> I must say the way I practice and the way a lot of people now practice - because I think there is a sort of a broad sort of breed of family lawyers who don't - who aren't the old school of lawyer, .. the old sort of adversarial lawyers. That used to be the old bogey image. I think most of the family lawyers you will be talking to are reasonably sensitive .. and run their cases in a sensitive way. We will be meeting with one another to reach agreements, to see what agreements we have. So it is not that dramatic a change if you are already practising that way. ... There isn't as big a difference as there would have been ten years ago, although I like to think I was always reasonably sensitive to clients' needs. ... The way I practice also allows them - I also have a lot of regard in the adversarial process for client's emotional difficulties and I give them quite a lot of room and scope to deal with that. I don't get uncomfortable when people get upset, I just try to help them through that time. ... If anyone wants a heavy gun, he must go to one of the lawyers who specialize in that. (out-of-court mediator)

Nineteen of the practitioners complained that family lawyers lack training in conciliatory techniques. Of these, most thought that all family lawyers should receive this training before beginning to practice family law:

> It would be helpful if they were trained in a more conciliatory approach and that they are trained to use that with their individual clients - not to incite their clients to go for the jugular in every case, but to remind them there are children involved, and this is the person you chose to marry, that sort of thing. (in-court conciliator)

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65 See footnote 43b.

Nineteen of the practitioners worried that some lawyers would never truly support mediation because of fears of loss of income. A few mediators worried that if lawyers did start to practice mediation, they would turn it into a money-making proposition. Seventeen expressed the concern that lawyers do not have an understanding of the psychological and interpersonal consequences of divorce and family reorganization.[66] Again, many of these mediators thought all family lawyers could use at least some preliminary education in this area before practising family law:

> I think [lawyers need] some fairly basic input on the psychological effects of the whole process of marital breakdown on separation and divorce. ... One of the common things we get is that when children come back from access they show disturbed behaviour, whether it is crying, kicking the dog, whatever. [Lawyers need] just an understanding that this is a child expressing his hurt and anger because Mommy and Daddy aren't together any more. It is not coming because Dad has wound him up or put him through the third degree or whatever. It is just simply a child's reaction to anger and disappointment of having spent a pleasant time with Daddy and then coming back to Mommy and [thinking] 'Why the devil can't they get back together?'. The solicitors look at you in amazement when you describe this to them because they are advising their clients, "Well, if it is disturbing the child, then it can't be good", instead of saying, "This is normal. It is to be expected. This is a normal, healthy reaction". It is the child who is right as rain that you have to worry about. (in-court conciliator)

> I would say what would possibly be missing [from the education of lawyers] is a very broad overall look at the effects of divorce on children. I have a suspicion that many haven't had even one lecture on the effects of divorce upon children, child development, the effects of separation and divorce. (in-court conciliator)

This study did not include research into the education and training of family lawyers in England but it is likely that the latter mediator's suspicion has some validity. Although most family lawyers will gain some exposure to these matters in their family-law practices, one wonders about the representativeness and breadth of that exposure.

When we look at the practising mediators' views on the importance of mediators receiving education on the psychological effects of divorce on family members in chapter 12, we shall find that 91.2% of the practising mediators considered

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66 See also, inter alia: L. Parkinson (1987c): 17; M. Oddie (1986): 374.

the education essential. Clearly the practising mediators had found this subject vital to mediation practice. We might compare this level of endorsement with that given to the subject by family lawyers. Only 41.7% of Solicitors' Family Law Association (SFLA) members surveyed thought it either essential or very helpful for family mediators to acquire this knowledge.[67] This level of endorsement may reflect the lawyers' own lack of knowledge of the area.

Fifteen practitioners, including one lawyer, said that they thought lawyers have poorly developed communication and listening skills. They thought these would need correction before lawyers attempted mediation:

> [Family lawyers] should be trained with a specialization - a year's course if you want to specialize - [including] child psychology. .. Some lawyers [know] that anyway. No one has trained them but they have worked it out for themselves. [Most lawyer's] social skills are appalling. They don't know how to talk to people about anything. (out-of-court conciliator)

> I think as lawyers we get very geared to a particular way of working which is very directive. Somebody talks to you and as they are telling you the case, you are already getting ideas of what should and shouldn't be. .. Then you immediately say, "Well, this looks like alternative weekends, um", and I think working with someone in another way [in mediation], you start realizing you haven't got all the answers and your answers aren't always right anyway. They aren't really the ones which are appropriate to the parties. You start listening more. That is really important. I think you get more sensitive to the needs of the parties. I think it is a heightening of awareness and a sensitivity which develops. That sounds rather corny, but I think it is true. (out-of-court mediator)

We can find other comments about the need for lawyers to improve their communication and listening skills in the literature.[68]

Another fourteen practising mediators said they thought family lawyers need to gain an understanding of family dynamics, families, or the ways family members interact. Similar comments appear in the mediation literature.[69] Some members of this

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67 L. Neilson (1990): 254-5.

68 L. Riskin (1982): 45-59; J. Wade (1983-5): 68; J. Whybrow (1988): 187; Working Party on Marriage Guidance (1979): 66-7.

69 Others have also argued that family lawyers need to gain a better understanding of families and how they work, see: J. Blades (1984b): 85; K. Kressel (1985): 165; M. Oddie (1986): 374; L. Parkinson (1987c): 17; J. Saposnek (1983a): 281.

group of practitioners advocated the need for a family-systems based theoretical understanding; others did not advocate - some even opposed - the study of any particular theoretical perspective.[70] Here are some examples of mediators' comments:

> [Lawyers need to understand] how they can be caught up in the dynamics, like or even ahead of their clients. It is critical for lawyers to be aware of - they are at the end of a powerful dynamic and so it is almost an invitation that they end up acting out the roles of the angry parties. (in-court conciliator)

> I disagree that they need to be a qualified solicitor or barrister [to practice conciliation] quite strongly. I think they should not be. ... Custody and access, in my view, does not need legal knowledge, it needs an understanding of what is going on between the children and the parents. (Solicitor and member of the Solicitors Family Law Association [SFLA]) [[71]]

Ten practitioners, including four lawyers, stated that before lawyers would be able to adapt to the role of the mediator, they would need to abandon their directive tendencies:

> I think a lot of lawyers don't really think it is the client's decision. A lot of lawyers need to control. (out-of-court mediator)

> They don't lack any skills anyone else has. If they have the right personality, they can acquire the skills. They may, again, have to unlearn certain things, like taking over when defining issues, those sorts of things. But I think the dangers are less than the dangers of imposing therapeutic assumptions - because the differences are starker. (out-of-court conciliator)

Another ten practitioners, including the lawyer quoted below, suggested that family lawyers need to acquire some of the skills counsellors have:

> [Family lawyers need] the kind of skills counsellors have - the understanding of emotional problems, children's needs. I don't think they get enough of it in their law training. I try to convey some of it in my family law teaching but it is very limited and maybe other family law teachers provide even less. (out-of-court conciliator)

Again, we find similar comments in the literature.[72] In chapter 12 we shall

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70 For discussion of this debate, see chapter 12.

71 This quotation was taken from a family lawyer, not from one of the 14 mediators. It was placed here because it clearly expresses the point of view.

72 See also: R. Cavenaugh and D. Rhode (1986): 152; G. Davis (1988a): 91; P. McKenry, M. Herrman; R. Weber (1978): 16; M. Wolff (1982-3): 223-5.

examine the differences and similarities between counselling and mediation, and the need for mediators to have education and training from this area. We shall find that family lawyers attached more importance to this area than did the mediators, primarily because the mediators were clearer about the differences between counselling and mediation. We shall conclude that it appears that mediators need many of the same skills that counsellors need but do not need to know how to provide counselling.

Several mediation practitioners expressed the concern that lawyers would have difficulty with mediation because mediators and lawyers do not share common perceptions: lawyers tend to look for facts, for truth, for right and wrong; mediators are more concerned with how things are perceived. One of Greater London's practitioners expressed the problem this way:

> I don't think we completely understand what it is like to be a solicitor and they certainly don't understand what it is like to be a conciliator. The truth of fact is very important to them. Whereas with us the fact is just an indication, with us a fact is an expression of what someone is feeling. So we have a different perception of what a fact is. I am interested not in the facts, I am interested in how they see the future, not in what happened in the past and who was right and who was wrong; perhaps some of it is relevant to what one should do, but only those things. It is the meaning of behaviour that matters to us and not the behaviour itself and that is quite difficult for lawyers to pick up. (out-of-court conciliator) [73]

This practitioner raises a number of important points. The courts have traditionally[74] had to weigh evidence of what has happened within a family in the past in order to make the orders necessary to govern the family's affairs in the future. Lawyers, because they are trained to prepare their cases for the courts, have probably reflected this focus on the past, and on determining right and wrong, in their dealings with their clients and during their negotiations with each other. Courts and lawyers assess family-law cases in this way because there is as yet no accepted method of

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73 For similar comments, see: D. Saposnek (1983a): 179. See also: R. Fisher and S. Brown (1988): 28.

74 I use the word 'traditionally' because courts are increasingly seeking the opinions of social workers, psychologists, psychiatrists etc about the future care of children.

predicting future human behaviour.[75] Fairness has therefore dictated that an adjudicator decide matters on the basis of the evidence of the past. The problem is that connections between past and future behaviour may be tenuous, particularly in cases of divorce and parental separation where the circumstances of the parents change so dramatically.[76] Nevertheless, neglect by adjudicators to consider past behaviour and reliance solely on 'expert' predictions and assessments, is unlikely to remedy this problem, at least not until the expert opinions are based on solid substantive knowledge. At the moment it is doubtful that the social-work and mental-health disciplines have the substantive knowledge necessary to make accurate assessments and predictions of human behaviour on an individual or family basis.[77]

Unlike adjudicators, however, mediators do not have to be concerned with weighing past behaviour and evaluating families since they do not have an adjudicative function. They do not have to decide who is right or wrong, better or worse. Consequently they do not have to determine the facts of the case. Perhaps an example will help to clarify this distinction. The lawyer in the adversarial process will want to know, for example, whether it is true or false that the parent seeking to have more contact with the child is a drug addict. Thus he or she will want to know past drug consumption levels and frequency, past behaviour while drugged, and so on. The mediator, on the other hand, will bring the present fears, if any, of the other parent relating, for example, to the safety of the children, into the open in order to help the parents design a parenting plan that will allay the concerns of one parent while allowing the other to see the children safely and in accordance with the family's wishes. The mediator will not try to determine objectively whether or not the parent has had a drug

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75 See footnote 77.

76 J. Wallerstein and J. Kelly (1980c) and W. Hodges (1986): 162 note that pre- and post-divorce family relationships often have little correlation.

77 C. Clulow and C. Vincent (1987): 167, 182; G. Davis (1988a): 158-160; M. King (1981): 109; R. Levy (1985): 498-503; S. Maidment (1984): 77; M. Murch (1980): 130; N. Stone and L. Shear (1988): 49-64; A. Sutton (1983): 123-151, (1981): 45; E. Szwed (1984): 265.

problem because as soon the mediator tries to do so, he or she has taken on an adjudicative role. The objective fact of addiction may not even be relevant. Instead, what is important is that the one parent has fears that both parents will need to address in order to resolve their conflict. The mediator who searches for facts potentially is placing him or herself in a position where he or she will have to make judgements about the validity of those facts, where he or she will become a judge rather than a facilitator. The mediator who helps the disputants accommodate each others' fears and beliefs will maintain a facilitative role. The difference is important to mediation.

The practitioners' comments about lawyers as potential mediators were not all negative, however, in spite of the fact that the practitioners were asked only for their criticisms.[78] Twenty-two of the practitioners insisted that lawyers have the advantage of having the legal knowledge needed for mediation, particularly in the financial and property areas. Other mediators mentioned, as positive attributes, lawyers' clarity and ability to remain focused on the tasks at hand, and their negotiating skills.[79] In chapter 2 we learned that Greater London's mediators were weak in their legal education. In chapters 11 to 13 we shall find that 96.7% and 87.1% of the mediators considered negotiation skills and knowledge of custody and access law respectively either very helpful or essential mediator knowledge. It appears that the mediation practitioners recognized their own need to acquire some of the knowledge and skills of lawyers. Not surprisingly the family lawyers in Greater London who responded to the SFLA survey agreed.[80]

The mediation practitioners have offered here a number of suggestions for lawyers wishing to practice mediation. Lawyers are advised to acquire some of the skills

78 The question (with occasional minor variations) was: What education, training or skills, if any, do you think lawyers lack in dealing with families in conflict upon family breakdown? I felt that, because the practitioners would know that I was a lawyer, they might be reluctant to offer their critical views of the legal profession. To counteract this, I asked the question in the negative.

79 Lawyers do have negotiating skills but of a different type than those needed in mediation. For further discussion, see chapter 11.

80 L. Neilson (1990).

that counsellors and social workers have, or to mediate together with others who have those skills. The mediators warn lawyers-cum-mediators against aligning themselves with one disputant or one side of a dispute. They advise them to abandon any tendencies they may have to be partisan and to see things in terms of right or wrong, to resolve disputes in an adversarial or confrontational manner, to tell people how to solve their problems, or to attempt to determine objective facts in place of developing a respect for the validity of individual perceptions. The mediation practitioners also suggest that lawyers acquire some education in child and adult psychology, conciliatory techniques, interpersonal communication and listening skills, family dynamics, and counselling skills. We shall discuss the parameters of the education that the mediation practitioners recommended for mediators from these subjects in chapters 11 to 13.

Mediation and the Social and Mental Health Professions

If lawyers presented problems for the mediation practitioners, how did they feel about candidates from other disciplines? Earlier we saw that fourteen of the practitioners said they would prefer to limit entry into mediation to those from the social, counselling or mental-health fields. This was a minority position. None of the practitioners proposed excluding social workers, court-welfare officers, family therapists, or marriage guidance counsellors (excepting the few who said they would exclude Marriage Guidance counsellors because of their lack of professional status) from mediator training. When we compare the mediators' views with those of Greater London's family lawyers, we shall discover that the lawyers limited their endorsement of social-workers, psychologists, and marriage-guidance counsellors to mediation of minor child issues, they refused to endorse their ability to mediate financial and property issues. The majority of the lawyers did not, however, wish to exclude members of these disciplines from mediation training.[81]

81 Ibid.

The fact that most lawyers and mediation practitioners would grant social-workers, counsellors and the mental-health 'professionals' entry into mediation did not mean that the mediation practitioners did not have concerns about the suitability of these disciplines for mediation practice. Let us look at some of those concerns, starting with mediators' concerns about family therapists.[82]

Mediation And Family Therapy

In chapter 2 we saw that thirteen of the mediation practitioners claimed to have found their experiences as family therapists particularly helpful to them in the practice of mediation. At the time we wondered if some of the practitioners held this point of view because they had not fully made the transition from family therapy to mediation. We saw examples of therapeutic methods being used in place of dispute-resolution methods in chapters 3 and 6 and Appendix A-1. When we examine the mediation practitioners' comments as a whole, we find that as many practitioners considered a family-therapy background as much a drawback as an asset to mediation. Fifteen of Greater London's practitioners (including two non-family therapists) commented that they thought family-therapy training or experience an asset to mediation or mediation training; another fifteen commented spontaneously that they thought it a drawback. While none of the mediators thought family therapists should be excluded from mediation training, they did express concerns, for example:

> But some backgrounds might be a disadvantage, where they would have a lot to unlearn, like psychotherapists and family therapists. They would tend to, and in my experience they do, tend to see mediation as an extension of family therapy and if they do, they won't make good mediators - and they have to unlearn more than most. Social workers and family therapists have to unlearn a hell of a lot first. (out-of-court conciliator)

> We used family therapy with a step-family and I think the value of

82 Comments about the professions, with the exception of lawyers, were usually made without solicitation during general discussions about the role of the mediator, the goals of the mediation process, or about entrance into mediator education and training programmes.

> family therapy is with a complete family. .. - where there is an investment in staying together as a family. ... With ours [our families] what they are doing is they are disintegrating and I have racked my brains thinking how can I use family therapy when one-half wants to do one thing and the other half something else. They are reorganizing themselves in the face of new information. I don't think family therapy is appropriate in this situation, it has its place. ... I worked for three years in marital therapy with children who had broken the law and it was 100% appropriate and I thought, when I came here [to a court-welfare agency], 'Fine. I can just transfer those skills here' and I learned from experience differently. I don't speak just off the top of my head, but from experience. I don't feel it is appropriate. Yes, with step families - to work with the new family and how they can withstand the pressures from out there [from outside the family system], then it is helpful. (in-court conciliator) (*We shall discuss some of theoretical aspects of the application of family systems theory and therapy in mediation in chapter 12. See also chapter 6.)*

> I had to find my way from family therapy to conciliation and I had a very hard time trying to figure out what belongs to what. I needed a consultant to work alongside me, an experienced conciliator to really check out whether I was doing conciliation or family therapy. (out-of-court conciliator) [83]

> I personally think mediation is about starting again and the issue of the old family and putting so much emphasis on it - I am not convinced people need to focus so much on the old family when they are starting a new life. I suspect they [family therapy mediators] think the family ought to be in family therapy and perhaps [that] there is still a chance for them. ... Also I feel families are tricked into family therapy with it [the incorporation of therapeutic methods in mediation[84]] and they didn't come for therapy. (out-of-court conciliator)

The problem, as we saw in chapter 6, is that the roles of the therapist and the mediator are very different. As lawyers are warned to abandon their supportive but directive roles and their assumption of substantive decision-making power, so also are therapists warned to abandon their attempts to assess, to cure, and to heal.

Mediation And Social Work

The practitioners also had concerns about the abilities of social workers to adapt to the role of mediator. While thirty-two made favourable comments about the suitability of a

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83 See also L. Gold (1985): 16-20 concerning the difficulty of changing from a family therapist into a mediator.

84 These comments were made in response to a question about the need for mediators to understand family systems theory. For references to others who feel the same way, see chapter 6.

social-work background for mediation, forty-four made unfavourable comments. One cannot assume from these numbers that the majority of the practitioners considered social work an inappropriate background for mediation. Many practitioners did not make any comments on the matter and none of the practitioners sought to exclude them. On the positive side the practitioners felt that social workers would have a solid understanding and appreciation of the emotional dimensions of the divorce and separation processes:

> The advantage of the good social worker is a good understanding of what is happening with these people. (out-of-court conciliator)
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> [Mediators need] some training. The skills are quite specific. - not necessarily a university course. The skills form other areas are very useful - people who have done marriage guidance, family therapy, social work, .. because you need to have some understanding of the emotional issues. But it is a very specialized skill, especially if they come from other areas, because otherwise they may just sort of transfer their skills and then - There must be some degree, I won't say uniformity of practice, but some common ground between the mediation services. (out-of-court conciliator)

Although the practitioners considered social workers to have the substantive knowledge about the emotional components of family-law disputes that mediators need, they were concerned about the adjustments that social workers would have to make in their approaches to these problems:

> I would include social workers, family therapists, those with counselling backgrounds - but, again there is a danger. It is difficult to make the transition from family therapy and counselling to mediation. I think some solicitors would make excellent mediators, maybe also people from industrial mediation. There are advantages of each profession, but on the other hand you need knowledge of people in distress. Each profession brings something with them. (out-of-court conciliator)
>
> [Mediation needs] people who - they must know about conflict. ... Social work training was not of much use in mediation. [It was] almost in the way. It has a measure of authority behind it which is quite out of place in mediation. (out-of-court conciliator/social worker) [85]
>
> You really don't have time to address the hidden message. That is what I am not prepared to do any longer. My traditional social work training geared me to listening to what was happening underneath [the particulars

85 See also: J. Howard and G. Shepherd (1987): 11.

> of what the clients were saying or complaining about] and addressing that and if you get stuck on that, you will never get anywhere [86] - but it does help you know when we are never going to get anywhere because the problem is 'X'. ... You can hear them [the underlying problems], you can pick them up, but all that will do is give you an assessment of whether to become involved in negotiation or not. But I would not address those underlying feelings, that is therapy, which is another issue. (in-court conciliator) [87]

> It is quite difficult if you get someone in and you can see what is underlying all this [dispute/conflict] is another underlying area which it isn't, strictly speaking, your business to tackle. You might put a marker down: that they may have this problem they might want to consider. I don't want to get into this business of everyone who comes to a social worker, having their problems redefined for them. (out-of-court mediator/social worker)

> [For those] of us who have been trained [in psychiatric social work] it is very difficult for us to know when to stop and not go into the counselling in such a way that you disturb them and then you don't see them again. So you have to be very careful. You are not in a clinical setting, you're not a clinic, not a therapeutic establishment .. They go away .. and you never see them again. You need to be careful as to what you are stirring up in the pot. ... I have to be careful when I find myself caseworking, because I agree with [named mediator], that we must be careful here and really be aware of what they've come for and not change it around. They haven't come for a psychoanalytic sessions. (out-of-court mediator/social worker)

The problem again appears to be one of adjustment to the role of mediator. The practitioners accredited social workers, as they did lawyers, with having some of the substantive knowledge necessary for the practice of mediation. They noted, however, that social workers, like therapists, would have to make great adjustments in their roles with clients and in their perspectives towards their clients' problems. In particular, the mediators warned that social workers would have to abandon claims to superior understanding, to abandon their desire to assess, cure, change, or fix people and their relationships.[88]

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86 For some of the authors who have warned or commented that social workers and therapists tend to change mediation into a therapeutic process, see: G. Davis (1983a); Department of Justice (1988b): 165-9; N. Kaplan (1984): 48. See also footnote 15.

87 This mediator is saying some of the substantive knowledge of social workers may be helpful as background information, and in order to understand when mediation is inappropriate, but that social work methods are not.

88 See also chapters 6 and 12.

Mediation And The Marriage Counsellor

The practitioners also commented on the attributes of marriage-guidance counsellors. Seventeen made favorable comments; eighteen pointed out drawbacks to marriage-counselling experience. The mediators admitted that counsellors develop helpful interpersonal listening and communication skills from their training and counselling experiences, but they were concerned about what they perceived to be marriage counsellors' propensity to try to save marriages and to engage in counselling. To a certain extent this view is incorrect. Marriage guidance counsellors do not always try to keep marriages or relationships together, if this is not what the clients want. On the other hand, the fact that much of their work is devoted to helping people overcome marital troubles might be expected to colour counsellors' perceptions. The mediators argued as follows:

> We had a lot of discussion about this - self criticism [in a course on mediation]. ... The marriage guidance counsellors, they felt their biggest hurdle is their feeling that this marriage is not really over; that maybe if we work at it, we can save it. ... So we all had drawbacks. (in-court conciliator)

> One of the difficulties is when people come for help, we all have our own need to give and what is difficult is when they haven't asked for it. That is one difficulty [with the practice of mediation]. A lot of people, particularly [those] from Marriage Guidance - you've got to really get your blinkers on and think, 'This is what I am. I am a conciliator.', and forget about the marital part. You may need to recognize the [problems with the] marital interaction because they will be reflected in the divorce process but there is nothing you can do about it [to correct it]. (out-of-court mediator)

> [The time limitations are] quite frustrating for me as a counsellor because I find it very limiting. I would like to go on. I remember one case [named mediator] and I disagreed and we finished it in two sessions and I didn't say anything. I should have liked to have said to her, 'I think we need another session', but that is the counsellor in me speaking. As I say, I have to watch that. (out-of-court conciliator)

> [Marriage counsellors need] to stop running after all the comments flying straight by, to let [more] flow over their heads rather than chasing after [all the collateral feelings] as they would if they were counselling. I find this difficult but you can end up miles away from where you started. (out-of-court conciliator)

> It is better to take someone who is the right material and train them than to take someone who is a counsellor, because they are not thinking the same way as a mediator. A mediator is different from a counsellor. Counselling is done over a long period of time. You get to know them. ... It should be a whole separate body of people doing this work. (out-of-court conciliator)

Again, we find perceived problems with the adjustment of this 'profession' to the role of mediator.[89]

Mediation And The Court-Welfare Officer

Interestingly, the practitioners' concerns about court-welfare and probation officers differed from their concerns about social workers. This is somewhat surprising, given the fact that most court-welfare officers in England receive the same basic education and training as social workers. Presumably, if the practitioners' concerns have validity, the court-welfare officers' 'professional' practices in the courts were as influential in their socialization as their initial education and training.[90]

The mediation practitioners thought that court-welfare officers would have advantages as mediation trainees because of their knowledge and experience with both

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89 For a discussion of the relationship between counselling and mediation, see chapter 12.

90 Certainly the outlook of the probation and court-welfare officer mediators mediating in Greater London appeared to be different from that of the social workers although given the number of practitioners interviewed, this may have been a coincidence. To a certain extent, in addition to different occupational experiences, the difference may also have been a reflection of the differences in perspective between court-welfare officers trained by the Home Office and those with social-work training. These differences may again have been a coincidence, or a function of education, or of age and experience. Those who were trained by the Home Office were older and tended to have more experience. Generally the probation and court-welfare officers with the social-work backgrounds were more apt to dislike the adversarial system; to place the perceived interests of their clients before those of the courts; and to be more interested in therapy and the application of therapeutic methods than were the officers trained by the Home Office. Those who were trained by the Home Office usually saw their own role as officers of the court, they were skeptical about the ability of any one theoretical social-work or therapeutic perspective to meet the needs of all of their clients, and they tended to be committed to dispute/conflict resolution rather than to the use of therapy. If these preliminary observations taken from interviews with a limited number of practitioners hold true for the service as a whole, this could be of great importance. The justice system needs to decide what sort of court-welfare service it wishes to offer. If therapy or therapeutic processes are sought then it appears entirely appropriate to solicit court-welfare assistance from those with social-work and therapeutic backgrounds. If, however, the courts want court reports and welfare assistance from those who consider themselves to be officers of the court, and if the courts want to provide dispute-resolution and not therapy, perhaps the justice system should reconsider the advisability of limiting court welfare work to those with social-work backgrounds. (See: Children Act 1989, s. 7)

law and the social/human aspects of family law conflict:

> Lawyers need to work on acquiring counselling skills and Marriage Guidance counsellors on the legal side. Court-welfare officers are better equipped because they have a foot in both camps and can perhaps move more easily [from one side to the other]. (out-of-court conciliator/court-welfare officer)

The family lawyers, apparently for similar reasons, endorsed highly the abilities of court-welfare officers to mediate child issues.[91] The mediation practitioners also thought the breadth of experience that court-welfare officers acquire as probation officers would be helpful in their adjustment to mediation. (In 1987/1988 in Greater London, it was the Probation Service's general practice not to assign probation officers, who handle primarily criminal matters, to specialist family court-welfare teams until they had had five or more years of experience as probation officers.) The mediators argued:

> The diversity in the probation officer's life makes them very knowledgeable about life, the ways of the world. It is a good background to ensure that someone is not judgmental. (out-of-court conciliator/former court-welfare officer)

The mediators were concerned, however, about the need for court-welfare officers to abandon the authoritarianism that the practitioners thought they acquired in the courts:

> In my own staff there are some who are hopeless [as mediators] because they are too dominant, too directive. ... Some people find it hard to be neutral. ... Among the officers we have different views and different approaches. Some are more conciliatory than others. One or two take the approach that they are the experts and that they have been appointed to give an expert opinion on the family whereas most of my staff take the view that the family are the experts. They [the parents] know the children better than we do. (in-court conciliator)

> There is a problem with being a statutory agency within a conciliation setting. We must change our role - because we are then no longer statutory probation officers when we are in that conciliation setting. .. It is very difficult to switch because we are used to having that authority and the big bugbear, when I got into this [conciliation], was realigning myself into this passive, non-directional approach. (in-court conciliator)

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91 L. Neilson (1990). The solicitors did not think court-welfare officers had the background needed to provide global mediation.

> Some probation officers have never done a mediation. Some are so investigative that in spite of their experience, they are never going to make a mediator. ... They still need the right personality and life experience. (out-of-court conciliator/court-welfare officer)

We looked at the role of the mediator with respect to substantive power and the role of the expert in chapter 5. There we noted that, while mediators must at times fulfil an educative role, most practitioners considered it inappropriate for a mediator to act as the expert or in an authoritarian manner. We saw that most practitioners wanted to ensure that mediators entering the mediation 'profession' would protect the rights of others to make their own decisions, that they would not dominate people or their decisions. Earlier we saw that practitioners thought lawyers would have difficulty adapting to mediation because they thought lawyers would tend to assume too much responsibility for their clients' problems, thus overpowering them. Here we see practitioners' concerns that court-welfare officers would also have difficulty divesting themselves of authority and power. The concern seemed to be that both lawyers and court-welfare officers would tip the balance of power within the mediation process away from disputant autonomy towards expert control and decision making.

The practitioners were also concerned that court-welfare officers would have difficulty changing from their normal role as promoters of the welfare and best interests of children to that of promoting disputant and family autonomy:[92]

> [The most difficult aspect of mediation[93] is] the one I just mentioned, where I personally am concerned about the agreement the parents are

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92 a) See G. Davis (1983a): 11, (1983b): 140 for an exploration of this and other professional issues.

b) No one suggests that mediators should help parents make agreements that are dangerous or harmful for children. Clearly other processes are appropriate when children are in potential danger. Instead we are considering the role of the mediator when the parents are reaching an agreement that the mediator does not think is the best that could be devised but which is not positively harmful. As we saw in chapter 5 this was a particular problem for the court-welfare officers because any agreements reached during in-court mediation were immediately turned into a court orders. Disputants had little time to consider the implications. The officers were very much aware that once the court granted the 'consent' order', the judicial system's ability to insist that the interests of children be protected was no longer hovering in the background of the parents' dispute.

93 This quotation was taken from the officer's response to an open-ended question about the most difficult aspects of the mediation process. It was left open to the practitioners to discuss either professional problems or difficult cases/disputants.

> about to make, especially as a court-welfare officer where most of the work I am doing is informing the court whether something is or isn't in the child's best interests. As conciliator, if I see something happening between the parents which I don't think is in the child's interests but isn't in the area of child abuse, where I would have to step in, then I find it uncomfortable. (in-court conciliator)
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> [Mediation won't work[94]] if you think the parents are making inappropriate arrangements for their children and not taking into account their needs. You, as a court-welfare officer, must then say, 'My priority is for that child' and 'I do not agree' and you must stop it there. (in-court conciliator)
>
> I violently disagree with this fundamental assumption of conciliation that the parents know what is best for the children. That is generally true but quite often the parents do not know and there is an ethical conflict when you realize what is best for those children. [You have to] take power away from the parents, or at least one parent. That, as far as I am concerned is the back-fall. What I do then is concentrate on what is right for the child. (in-court mediator) [95]

The role of court-welfare officers in promoting the welfare and best interests of children needs to be distinguished from child representation or advocacy, which is not part of a court-welfare officer's role.[96] The court-welfare officer derives his or her protective role from his or her duties to give information to the court about how best to protect and promote the welfare and best interests of children, rather than from a professional relationship with the child. This distinction is not always understood by practising court-welfare officers. In practice, as we have seen, some officers do become child advocates.[97]

In chapter 5 we discussed the views of practitioners concerning the mediator's role with respect to children. There we saw that, although nearly all the practitioners attempted to protect the interests of children, they advocated different methods of doing so. It appeared that mediators could promote the interests of children without taking power away from disputants if the promotion of the interests of children was tempered

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94 This is a response to an open-ended question about the situations where mediation does not work.

95 Although we used this comment in chapter 5, when we were discussing expert and disputant power, it seemed apropos to include it again here.

96 A. Head (1988): 178; M. Parry (1988): 52.

97 See chapters 3 and 5.

by respect for disputant autonomy. It was also apparent, however, that when mediators became advocates for the children the mediation process was distorted. Although most of the 102 practitioners interviewed did not advocate or illustrate child advocacy, sixteen did do so. Of these sixteen 'child advocates', eleven (68.8%)[98] were probation or court-welfare officers. This indicates that the mediation practitioners' may have had some basis for the concerns they have raised here.

The Congruity Of The Practitioners' Theoretical Perspective And Mediation

Another practitioner was concerned less with the 'professional' backgrounds than the theoretical perspectives of those who would wish to undertake mediation training. This mediator argued that there are certain theoretical orientations that are clearly inappropriate to mediation because they hinder rather than promote disputant autonomy:

> Social workers, probation officers, psychologists [all have helpful backgrounds] but I wouldn't see all of them [in mediation]. Some social workers, probation officers, psychologists work from a community basis: networking[99] - and I don't think that would be terribly helpful. If I was going for probation officers and social workers, I wouldn't go for those who take a victim approach and want to change the world, because I think when you are working with families it ought to evolve into them taking responsibility for their own behaviour.

As we have already mentioned mediators must be careful when using the terminology from other disciplines. A. Milne (1988b): 386-7, for example, endorses the use of 'networking' in mediation. It is reasonably clear from context and from the author's other work that 'networking' is used to mean the need for the various professions dealing with the divorcing or separating family to co-operate with each other and with each other's processes, and not the inclusion of a battery of professionals and community members to assist the family in their negotiations. Technically, networking means the latter. Inter-professional co-operation is clearly appropriate

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98 Court-welfare and probation officers are overrepresented here. Only forty eight (47.1%) of the Greater London practitioners interviewed, were court-welfare or probation officers.

99 For additional comments on the meaning of networking, see chapter 3 and Appendix A-1, service 16.

during the mediation process; networking may not be. If mediators transfer decision-making power from the disputants to other professionals and/or to members of the disputants' community, the mediation process as we know it will change dramatically. Decisions may be made but the process will be closer to arbitration or community adjudication than to mediation, replacing judges with a group of professionals or community members. The mediator quoted above is using the term 'networking' in its technical sense. By 'victim approach' the mediator means those who subscribe to the notion that all personal and social problems are caused by inequities in our social structures and institutions, and who therefore do not think people and families are responsible or accountable for their own destinies.

This practitioner reminds us that we cannot generalize about the attributes of any given profession, for each profession has within it different schools of thought, each with its own norms and values, goals and methods. Presumably if entry to mediation programmes were to be limited to members of certain professions, theoretical differences would also have to be considered.

Summary And Conclusions

In chapter 9 we have encountered again a division among the practitioners: between those who wanted to train for mediation people with certain personal characteristics, and those who thought all mediators should have some 'professional' experience and or status before entering the field. We found that the mediators who suggested the need for a 'professional' background appeared to be concerned with professional status and power. We questioned whether this was appropriate, given the principles of mediation outlined in chapters 4, 5, and 6. Those who were opposed to imposing 'professional' limitations argued that personal characteristics were more important than substantive knowledge, and that most 'professional' methods and perspectives were inappropriate to mediation in any event and would, therefore, need to be overcome. The members of both groups

agreed about the need to screen prospective mediators on the basis of personal characteristics.

When we looked at some of the professional claims to 'ownership' of mediation appearing in the mediation literature, we found that many of the claims are spurious. We turned, therefore to an examination of the practitioners' views of the relevance of various collateral 'professions' to mediation to see if we could find other reasons for limiting mediation to members of certain disciplines. We looked first at the practitioners' views of lawyers as potential mediators.

Most of the mediators (over 71.6%) would not exclude lawyers from participation in mediation. (In chapter 7 we learned that although only 7.8% of the practitioners would exclude lawyers, another 20.6%% were noncommittal or did not address the issue). Yet they warned that there were a number of obstacles that lawyers would have to overcome. On the positive side, the mediators were quick to suggest that family lawyers have much of the substantive knowledge that mediators need, together with clarity, an ability to focus on the task at hand, and negotiation skills. They believed, however, that, before lawyers began to practice mediation, they needed first to abandon the ways they normally viewed and dealt with conflict including their perceived tendencies to judge; to see disputes in a partisan, one sided manner; to attempt to resolve disputes by focusing on facts and on what happened in the past; to use adversarial, confrontational, or directive methods. No doubt some of these tendencies reflect simply the adversarial process within which family lawyers operate. But regardless of their origin, the mediators warn family-lawyers-cum-mediators that they will have to overcome them if they ate to promote disputant rather than expert control. Certainly if mediators were to take sides in their client's disputes, were to use confrontation and argument to push particular agreements, were to direct disputants to accept particular solutions, and were to insist on preliminary determinations of the facts, the mediation process would lose many of the attributes that distinguish it from the

adversarial process. The practitioners also recommended that, before becoming involved in mediation, lawyers should acquire some education or upgrade their skills in the following areas: child and adult psychology; conciliatory techniques; communication and listening skills; family dynamics; and counselling.

What of the other collateral disciplines? Did the practitioners have convincing arguments for suggesting that these formed a good basis for mediation? There was a lack of consensus. As many practitioners criticized as endorsed the relevance of collateral disciplines. Essentially the practitioners accredited each 'professional' group with some of the substantive knowledge that mediators need but also with some debilitating tendencies. In sum, the practitioners did not want the "professionals' to muddy or change the mediation process by using methods drawn from their primary 'professions'; did not want them to play the role of expert, thereby threatening the disputant autonomy that the practitioners considered essential to the mediation process.

We found, among the practitioners, a consensus about the importance of mediators having certain personal qualities but a decided lack of consensus about the relevance of any particular professional background to mediation. Perhaps mediation might avoid professional ownership claims and the dangers of the process being muddied by the introduction of inappropriate processes if those who educated mediators abandoned occupational and academic considerations and solicited trainees with appropriate personal characteristics.

In chapters 11, 12 and 13 we shall examine the practitioners' recommendations that mediators should acquire knowledge of selected subjects. During those discussions we shall consider the extent to which knowledge from the collateral 'professions' is necessary or even relevant, but before we can begin that discussion, if we are to put the practitioners' comments in context, we must learn what the mediators hoped to accomplish in the training programmes. Did they hope to upgrade the methods used by volunteers? Did they hope to create highly trained professionals? In the following

chapter we turn to a discussion of the appropriateness of the professionalization of mediation.

CHAPTER 10

Mediation and Professionalization

Introduction

We now have a profile of Greater London's mediators and lawyers: their educational and occupational backgrounds and their mediation or settlement experiences. We know the experiences upon which the practitioners based their opinions about mediator education. We have also gained an appreciation of the mediation process, the role of the mediator, and the boundaries between mediation and the practices of family therapy and law. Thus we have an understanding of what mediators need to be trained to do. We also know the types of people seemingly appropriate for mediation and thus we have an idea of who the mediation students should be. We cannot explore the practitioners' proposals for the education and training of mediators, however, until we know what the practitioners hoped to accomplish through education and training. Did they hope to create a bevy of lay-volunteer mediators, or a group of highly trained professionals? What were their views on the professionalization of mediation? Should mediation be moving towards professional status?

Our evaluation of the practitioners' answers to these questions will form the basis of this chapter. In order to put the practitioners' comments in context, we must first discuss briefly some of the sociological literature on the meaning of 'profession' and the stages of professionalization. We shall then look at the place of mediation in that process, including in our discussions an examination of some of the difficulties standing in the way of mediation's professionalization and of attempts within the discipline to overcome them. Finally, we shall look at the differences of opinion among

Greater London's mediators about the feasibility of the professionalization of mediation to see if we cannot find some room for consensus.

We shall find that, given the lack of education and training required to perform the endeavor, the lack of public demand for the service, and the consequential lack of opportunity to practice mediation on a full-time basis, mediation in Greater London could not be classified as a profession, and appeared unlikely to acquire that status in the near future. Its inability to claim professional status may be an asset rather than a hindrance, however, to mediation's development. We shall find that many of the practitioners were concerned about the loss of cross-disciplinary fertilization and growth that professionalization would bring; others questioned the relevance of the role of the 'professional' to mediation, given the facilitative, non-directive role of the latter. We shall conclude that professional status is inappropriate to mediation, but that specialized education, competence, and procedural expertise are not. The practitioners' comments as a whole suggest that these - not the creation of a profession - should be the goals of educational processes.

The Meaning Of 'Profession'

Throughout this study we have been using the terms 'professions' and 'professional' in a very general, non-technical sense. We included in the meaning of the term 'professionals' all those who help others, unrelated to themselves, by applying knowledge, skills or techniques learned from those with specialized knowledge. We have excluded those who help others by applying knowledge derived solely from personal life experience. In this section we shall use a definition that is more specific, technical, and academically correct.[1]

When we examine the sociological literature on professions, the first thing we notice is the lack of full agreement on the meaning of the term profession, or on the

1 For the purposes of this chapter, I shall be using the terms 'profession', 'professional' in their technical senses unless I have enclosed the terms in parenthesis.

stages an that occupation goes through to order to achieve that status.[2] Certain traits and evolutionary stages of professionalization have been identified,[3] but there is no firm agreement on their relative importances or sequences.[4] Furthermore, the sociologists tell us that, in order for an endeavour to be accepted as a profession, besides having identifiable attributes it must also gain public acceptance of its claims to that status.[5] This means that there must be social, economic, and historic components to the process. These also have yet to be identified, explored and agreed upon.[6]

Fortunately for present purposes, we do not need fully to define the professionalization process. We need only consider some of the commonly identified attributes, for example: the development and establishment of a lengthy education and training programme for qualification to practice; the development of a code of behaviour and ethics; full-time practice; occupational autonomy at work; the development of a self-governing and independent body to enforce ethical rules and to govern the practice's affairs; the establishment of an exclusive right to practice; and the assertion, and public acceptance, of claims of altruism, high ethical standards among members, exclusive expertise, community service, 'professional' objectivity,[7] and loyalty

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2 For example: P. Atkinson (1983): 225-239; R. Dingwall (1977): 118; E. Freidson (1983): 21, 35; T. Johnson (1977): 23-35; W. R. Scott (1969): 82.

3 For examples of some definitions: P. Atkinson (1983): 225-239; R. Bucher and A. Strauss (1960-61): 325-32; R. Dingwall (1977): 118-137; R. Dingwall and P. Lewis (eds.) (1983): 5-7; P. Elliott (1972): 94-142; E. Freidson (1983): 19-36; W. Goode (1969): 269-294; G. Harris-Jenkins (1970): 54-107; J. Jackson (1970): 1-14; T. Johnson (1977): 22-35; R. Lewis and A. Maude (1952): 57-73; T. Murray, R. Dingwall and J. Eekelaar (1983): 195-199; D. Reuschemeyer (1983): 53-55; W. R. Scott (1969): 82-124; N. Toren (1969): 142-147. One wonders whether the attributes identified are fundamental to professions or whether they are simply descriptions of those occupational groups that have been accorded professional status.

4 See footnote 2.

5 R. Dingwall and P. Lewis (eds.) (1983): 7; E. Freidson (1983): 24-35; W. Goode (1969): 277; T. Murray, R. Dingwall and J. Eekelaar (1983): 195; D. Reuschemeyer (1983): 38-55; W. R. Scott (1969): 125.

6 P. Atkinson (1983): 234; R. Dingwall and P. Lewis (eds.) (1983): 7; T. Johnson (1977): 23-35; W. R. Scott (1969): 82. Professional status may be becoming less important anyway with the large number of occupations now seeking that status: P. Elliott (1972): 151; and with the development of monopolies and protections offered by trade unions. Perhaps current social movements towards egalitarianism and increased government control will make the issue of professional status obsolete.

7 This is sometimes called 'effective neutrality' but it is clear that the term is similar in meaning to the term 'professional objectivity' we identified and discussed in chapter 8.

to the interests of the profession's clients.[8] It has been suggested that one of the things distinguishing a semi-profession from a full profession is that members of the latter adopt a technical rather than personal nurturing approach to their clients.[9] It is also commonly accepted that it is up to the professionals, not the clients, to determine client needs and that the level of expertise needed to perform the service is such that clients are unable properly to evaluate the service they are receiving.[10] Are these attributes desirable for mediation? We shall consider the practitioners' views on this issue shortly, but first we must take a brief look at mediation's place in the professionalization process.

Mediation And Its Place In The Professionalization Process

Few of Greater London's practitioners argued that mediation could be classified as a profession (although many were quick to point out that they thought it should be carried out in a professional manner). We saw in chapter 2 that the practitioners' educational levels would not justify even a quasi-professional designation;[11] that few practitioners identified mediation as their primary occupation; and that most spent only a few days a month providing the service.[12] All these factors would appear to negate defining family

8 For references, see footnote 3. Whether these attributes are essential components of a profession or simply characteristics which describe occupations which have been accorded professional status, is debatable.

9 D. Reuschemeyer (1983): 46; R. Simpson and I. Simpson (1969): 203, 235; N. Toren (1969): 155. See also the comments in footnote 12.

10 W. Goode (1969): 278-9; W. R. Scott (1969): 123-4. The legal and medical professions are becoming slowly but increasingly accountable to their clients. We are seeing lay representation on their professional associations, greater concern for the personal aspects of their client's problems, and consumer evaluations of the services they provide. Is this a reflection of the beginnings of a loss of professional status, or are the attributes of professions changing?

11 Assuming specialized knowledge specific to the task to be performed and lengthy educational requirements for qualification to practice are prerequisites to an occupation achieving professional status. See: P. Atkinson (1983): 225, 226, 335; P. Elliott (1972): 94, 96, 114; E. Freidson (1983): 23, 29; W. Goode (1960): 903; Harris J. (1970): 58, 69, 76; J. Jackson (1970): 9-10, 33; T. Johnson (1977): 23,28; D. Reuschemeyer (1983): 53; W. R. Scott (1969): 41-9; N. Toren (1969): 142. (Many of these authors stress the necessity for a linkage between skills and theory during professional education and training. I prefer N. Toren's, page 147, broader requirement: the need for a congruence between the systematic knowledge taught and the profession's norms and values.)

12 It is doubtful that one could speak of the evolution of a 'professional' endeavor into a profession until, among other things, that endeavor was ordinarily provided on a full-time basis. See, for

mediation in Greater London in 1987 and 1988 as a profession.

It is also fairly clear, however, that mediation was struggling with the issue. Mediation organizations and lobby groups in England and elsewhere are moving through some of the stages of professionalization that the sociologists have identified,[13] for example: battles with and attacks on the 'professions' already occupying the field (particularly lawyers and judges)[14]; the establishment of 'professional' organizations and codes of behaviour;[15] and attempts to exclude others from practice through certification or licensing.[16] Lacking, however, are lengthy periods of education and training in mediation.[17]

We find some associations and governments limiting the practice of mediation to those already having other 'professional' education, training, qualification, or status.[18] Many of the rules limiting mediation practice to those with existing 'professional' status specify the need for practitioners to have certain 'professional' educational qualifications

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example: T. Johnson (1977) :28.

13 For some of those who have identified stages in the professionalization process, see: R. Bucher and A. Strauss (1960-61): 326-32; R. Dingwall (1977): 118-137, 165-6; R. Dingwall and P. Lewis (eds.) (1983): 5-7; P. Elliott (1972): 112-142; E. Freidson (1983): 19-36; W. Goode (1960): 902-904, (1969): 269-294; G. Harris-Jenkins (1970): 54-107; J. Jackson (1970): 1-14; T. Johnson (1977): 22-35; R. Lewis and A. Maude (1952): 57-73; T. Murray, R. Dingwall and J. Eekelaar (1983): 195-199; D. Reuschemeyer (1983): 53-55.

14 See, chapter 9. See also: R. Haney (1988): 3, for an extreme example.

15 For example: Academy of Family Mediators (US); American Bar Association (1984a): 363; Association of Family and Conciliation Courts (1984): 7; T. Bishop (Vol. 17): 461, (1984): 5; Family Law, (1989): 456-7, concerning the Family Mediation Association (FMA) (England); Family Mediation Canada, Code Of Professional Conduct; National Family Conciliation Council (NFCC) (1984) and amendments; Ontario Association for Family Mediators, (1984) and amendments; A. Pirie (1985): 378; M. Wolff (1982-3): 213.

16 For example in England: M. Roberts (1990b), NFCC (1990). Most of the professional and occupational exclusions are contained in mediation association rules and therefore do not bind non-members. There are, however, some states in the United States that have legislated who may practice mediation. See: K. Dutenhaver (1988): 6; L. Hack (Vol. 18): 9; H. McIsaac (1983): 50; Society of Professionals In Dispute Resolution (SPIDR), Commission on Qualifications, (1988): 3.

17 See chapter 2.

18 See, for example: F. Burkhardt (1984): 28; A. E. Cauble, N. Thoennes, J. Pearson, and R. Appleford (1985): 31; D. Camozzi and A. Murray (1987); L. Hack (Vol. 18): 32; J. Lemmon (1985): 102; H. McIssac (1983): 50; NFCC (1988c); L. Silberman and A. Schepard (1985): 400. I am again using the term 'profession' broadly to include what some sociologists call the semi-professions, such as social work, divorce counselling and family therapy. (R. D. Borgman (1978); R. Simpson and I. Simpson (1969): 203, 235; N. Toren (1969): 155; but see also: C. Davies (1983): 178; W. J. Goode (1969): 280.)

prior to training as mediators. Many, for example, require a masters degree in specified fields. As we move through the practitioners' comments we might ask ourselves whether or not these limitations are warranted. Do they have an educative or a research basis? We found few valid reasons for limiting mediation to any of the collateral disciplines in chapter 9. Perhaps 'professional' limitations on practice serve only to bolster mediators' claims to professional status and to disguise the lack of education and training in the field.

Before mediation can advance further in the professionalization process it first has a practical hurdle to overcome: the lack of public demand. We know that many disputants, perhaps even the majority, settle their cases with little or no professional assistance of any sort by negotiating with each other.[19] We also know that some disputants want partisan support, and others adjudication.[20] It should not surprise us, then, to discover that voluntary mediation services, unconnected to the courts,[21] have had trouble generating clients,[22] and that to date few mediators (other than those who educate and train mediators) have been able to generate enough clients to be involved in mediation on a full-time basis.[23]

Twenty-three of Greater London's practitioners, without solicitation but during discussions about the professionalization of mediation, commented on this problem, as follows:

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19 See chapter 9.

20 C. Clulow and C. Vincent (1987): 220; G. Davis (1987): 307, (1988a): 14-15; G. Davis and M. Roberts (1988): 63; K. Kressel and M. Deutsch (1977): 429; E. A. Lind, R. Maccoun et. al. (1990): 952-89; M. Murch (1980): 222; A. Mitchell (1981): 34; Newcastle Report (1989): 280, 294-5; J. Pearson and N. Thoennes (1988a): 73; C. Savage (1989): 16. See also chapters 3 and 9.

21 Disputants feel that they have no choice but to attend court-based services even if those services are technically speaking, voluntary. See: Newcastle Report (1989): 285-288.

22 A. Bradshaw (1986): 3; S. Charlesworth (1991): 270, 272, 277; J. Folger and S. Bernard (1985): 5; H. Irving and M. Benjamin (1987): 49; S. Margulies (1987): 182; M. Mercer (1987): 3; C. Moore (1986): 45-6; Newcastle Report (1989): 42; F. Perlmutter (1987): 15; C. Pilmore-Bedford (1990): 206; J. Roehl and R. Cook (1989): 42; J. Walker (1989): 42, (1991): 257, 261; S. Zaidel (1991): 283.

23 See, for example: H. Irving and M. Benjamin (1987a): 22; E. Koopman and J. Hunt (1983): 26; S. Margulies (1987): 177; A. Murray (1987): 134; J. Pearson, M. Ring, and A. Milne (1983): 12; J. Pearson and. N. Thoennes (1985a): 454.

> I don't think it will ever become a profession. I don't know but I don't think you are ever going to get that many clients to make it a full-time profession. It will always be part of something else - or people like us working in allied professional fields. (out-of-court conciliator)
>
> The important thing is standardization and [public] protection. [*Do you think it will become a distinct field?*] The problem is that implies the development of the private sector. The private sector is not strong enough. The belief isn't there by the general public that it is important. The funding isn't there - limiting the possibility - if the courts had been stronger but now it is voluntary which means low funding. It should have been the state putting money in, closing them [mediation services] down if they were no good. If there was money there, then we could recruit people of exceptional ability. (out-of-court conciliator)

One of the mediators had carefully considered this lack of public demand and offered the following explanation:

> Partly why we aren't getting people, ... [is that] I think people actually also, to a certain extent, need the fight. It is a catharsis. You see I tried to put myself in that situation and thought, 'why don't people come?'. They all say, "Oh, if only I had known" but when it comes to the crunch they don't do it. Some people actually need a figure to say, "This is how it will be", otherwise they won't be able to accept it. ... I tried to think about [what it was like] when my children - until they were probably 14 and 15 - had my husband and I split then, and I can't believe it now, but I would have fought him to the death. To the death. And no mediator would have been sufficient. I wouldn't have given him those children and I would have died for it. Maybe that is the explanation. If he had gone to a mediator, I would have been frightened of it. I would have run away with the children. ... If I think about how I would have felt - Maybe feelings are too raw at that time whereas one year or two years later you've got used to it and can begin to feel you can actually talk to that person. (out-of-court conciliator)

Perhaps, as this practitioner argues, there are emotional and psychological reasons why many people do not want to mediate. Family lawyers in Greater London had also noticed a reluctance on the part of their clients to attend mediation. They commonly gave this as one of the reasons for their low rates of referral to mediation services.[24] Perhaps lawyers are not to be blamed for the lack of public demand for mediation. Perhaps the service is attractive only to certain segments of the divorcing public.

T. Murray, R. Dingwall and J. Eekelaar have commented that a professional monopoly without clients is absurd.[25] Many mediators, mediation associations, and

24 See: L. Neilson (1990).

25 T. Murray, R. Dingwall and J. Eekelaar (1983): 198.

lobby groups appear not to be aware of this; or they try to skirt the issue by advocating the creation of public demand artificially: by legislation and court procedures that limit access to the courts and that require people to attend mediation sessions involuntarily.[26] Is this appropriate? Our Greater London interviews do not offer much guidance. The interviews did not solicit a direct answer on this issue and, of the eighteen practitioners who commented spontaneously, nine were in favour of mandatory mediation to stimulate public demand and nine were opposed. Let us turn to the literature.

When we examine consumer evaluations of mediation services we find that many people like and benefit from mediation.[27] It also appears that a substantial number of disputants say they would approve of mandatory mediation, at least for disputes over children.[28] We do not yet know the effects of mandatory mediation on the success of mediation since the research literature in this area is contradictory. Most of the studies have shown that people who seek or have positive attitudes to mediation have more success in the process than those who have been pressured to attend;[29] other

26 See, for example: H. Andrup 49; R. Emery, (1988): L. Girdner (1987): 4, 8; D. Moir (1985): 4; L. Parkinson (1988): 323; C. Pilmore-Bedford (1990): 206; M. Trost, S. Braver, and R. Schoeneman (1988): 59; J. Wallerstein (1986/1987): 17.

27 For references to some of the consumer research, most of which is generally positive, see chapter 6 and the studies marked with an asterisk in the bibliography. When examining the research it is important to note that much of it compares the views of people seeking or voluntarily agreeing to use mediation (and even sometimes only those successful in the process) to the views of those in the adversarial process, whether by choice or not, and sometimes excluding those who were able to reach agreements. For research on the type of people who appear to benefit from mediation or on those who do not, see, inter alia: S. Bahr, C. B. Chappell, A. Marcos (1987): 37; C. Camplair and A. Stolberg (1990): 199-213; Department of Justice (Canada) (1988b): 110 (1988c): 41-45; H. Irving and M. Benjamin (1983): 65 (1987): 41-5; J. Johnston, L. Campbell, M. Tall (1985): 120-7; J. Kelly, L. Gigy and S. Hausman (1988); T. Kochan and T. Jick (1978): 221; K. Kressel, M. Deutsch, N. Jaffe, B. Tuckman, and C. Watson (1977): 10; K. Kressel (1985): 31-9; K. Kressel, F. Butler-DeFreitas, S. Farlenza and C. Wilcox (1989): 59-66; M. Little, N. Thoennes, J. Pearson, R. Appleford (1985): 4; E. Lyon, N. Thoennes, J. Pearson, and R. Appleford (1985): 17; J. Pearson and N. Thoennes (1985): 455.

28 A. E. Cauble, N. Thoennes, J. Pearson, and R. Appleford (1985): 32; M. Little, N. Thoennes, J. Pearson, R. Appleford (1985): 10; E. Lyon, N. Thoennes, J. Pearson, and R. Appleford (1985): 23; J. Pearson and N. Thoennes (1985a): 456.

29 H. Irving, M. Benjamin, P. Bohm, and G. MacDonald (1981): 62; J. Hiltrop (1989): 247-8. Not surprisingly, the Newcastle Report tells us that the involuntary mediation services were not as successful at gaining agreements as were those accepting clients on a voluntary basis. As a general rule the mandatory court-connected services, excluding those leading to a court report if mediation fails - which are essentially arbitration services - report lower agreement rates than do voluntary services. (The references to reported agreement rates for various types of mediation services are too numerous to include here.

studies have found little difference.[30] There are other factors, however, besides settlement rates that demand consideration.

Many mediation services do not allow the participation of the disputant's lawyers in the mediation process.[31] Will this lead to claims that the process denies (or at least limits) people's right to consult their lawyers and, given the gravity of the some of the decisions made during sessions, that it denies them natural justice? As one moves from voluntary to involuntary services, from mediators who facilitate to mediators who direct, and from out-of-court to court-connected services, the likelihood of the success of such a claim increases.[32]

Before we make mediation mandatory we should consider the effect that this would have on access to the courts. R. Dingwall and J. Eekelaar argue that legitimate access to the legal system is fundamental to the rule of law and that attempts to deny that access will likely succumb to legal challenges.[33] Involuntary, court-connected mediation may relieve some of the congestion in the legal system but at the cost of reducing people's access to the courts. We looked in chapters 3, 4, and 5 at some of the concerns of Greater London's practitioners about the potential of mediation to deny members of the public access to the justice system. We should also consider some of the limitations of mediation that have been identified in the literature such as: its limited ability to deal with power and negotiation imbalances; its lack of established education and training requirements for mediators; and its lack of procedural safeguards.[34] We

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Rather than list them, I have chosen to place an asterisk beside the applicable research literature in the bibliography. Please note that great caution should be exercised when looking at investigations conducted by or for the mediation service being studied. Self reported agreement and satisfaction rates are generally substantially higher than are those found by independent researchers.)

30 W. Richan (1988): 84, 89.

31 See chapter 3 and Appendix A-1.

32 See: R. Dingwall and J. Eekelaar (1988): 168.

33 Ibid.: (1988): 174.

34 For further discussion of some of the potential dangers of mediation, see, inter alia: R. Abel (ed.) (1982): 6-9; J. Auerbach (1983); A. Bottomley (1984); C. Bruch (1988): 119-121; S. Cretney (1984): 191-203; R. Dingwall and J. Eekelaar (1988): 168-179; H. Erlanger, E. Chambliss, M. Melli (1987): 597; O. Fiss (1984): 1073-1086; M. Freeman (1983a): 197-9; L. Friedman (1978): 26-35; R. Ingleby (1988): 51-4; S. Roberts (1987): 132-3; E. Szwed (1984): 276-7.

should also think about the implications of the research that shows an apparent tendency of many mediators to act like arbitrators or judges.[35] Finally, we should question how involuntary mediation can be rationalized with disputant autonomy and free choice. Is the artificial stimulation of public demand worth the risks?

If mediation's professionalization process is slowed by the need for more public demand, is this necessarily a bad thing? In chapters 4, 5 and 6 we saw that the Greater London's mediation practitioners stressed the importance of disputant autonomy and did not think it appropriate for the mediator to assume the role of expert. Can we reconcile this role with professional status? Should we try? Let us turn to an examination of the practitioners' views on this issue.

Should Mediation Professionalize? The Views of the Practitioners

D. Haldane identified four divergent views among English family therapists concerning the professionalization of that discipline.[36] These were: that the discipline should organize into a profession; that it should not professionalize; that practitioners should continue to identify with the 'professions' they had before becoming family therapists; and that family therapy should be reorganized into a new profession encompassing family therapy and all the disciplines seen to be collateral to it (including family mediation). Greater London's mediators expressed basically the same differences of opinion about the future of mediation. The only major difference was that the mediators who ascribed to Haldane's fourth position were divided into two camps: those who sought to incorporate therapeutic disciplines and perspectives into the newly formed mediation profession, and those who sought instead to incorporate non-family forms of mediation, for example labour, community, and international mediation.[37]

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35 See chapter 4. See also: R. Dingwall and J. Eekelaar (1988): 168; D. Greatbatch and R. Dingwall (1990): 53-64.

36 D. Haldane (1987): 138-151.

37 For discussion of the therapy and dispute resolution split in the family mediation field, see chapters 4 and 6.

The largest group of Greater London mediation practitioners (thirty-seven) were ambivalent about the potential professionalization of mediation, specifying benefits and drawbacks or obstacles. Two did not address the issue. Those who did express an opinion were almost evenly divided: thirty were in favour of moves to professionalize the service; thirty-three were opposed. Mediators in North America are similarly divided on this issue.[38] Let us now examine the reasons that practitioners gave for their views, beginning with those advocating professionalization.[39]

The most commonly stated arguments in favour of professionalization processes were educational. The practitioners sought higher education and training standards in order to increase the levels of substantive knowledge or the skills and techniques of the practitioners. They argued as follows:

> I would like to see it. I don't think you have to lose something. I think a lot of professions have lost something but so what. ... You would have a professional code of conduct as I can't see anything wrong with that. It might be easier to get financing for a recognized professional service. I recently went on a course for a voluntary service on bereavement and I was horrified - the standard was so much lower and we forget that. I would go for good professional practice. Even Marriage Guidance is not sufficiently professional. You need a strict academic base. You don't have to exclude people without academic training but they have to come out with it at the end to be a good conciliator. (out-of-court conciliator) [40]

> I still stop at that assumption and think, 'Is it right? Are we just playing lip service to trying to help parents work out their own decisions when really what we are talking about is planting a bunch of professionals coming in and imposing all their training and ideas about what is right?'. There is a little bit of danger there really, - that professionals will influence families toward the way the profession thinks things should be done. But then I stop and think, 'Where are we going? Should we be encouraging non-professionals?' ... I come out of that thinking, 'Well, no' - because of the problems that these issues involve and the level of skill involved. It is not like a support service, an advisor and friend, where people without professional qualifications can give excellent help. ... Particularly if one if going into finance and property - and even children - the effects of acute stress and the risks involved, leads me back to saying, "Yes, it has to be professional". (out-of-court mediator)

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38 J. Folberg and A. Taylor (1984): 233-259; J. Pearson, M. Ring and A. Milne (1983): 7.

39 Interviewees were never offered choices or limited to one answer and were always given the option, if they wished, of qualifying or changing an answer previously given.

40 The suggestion that the education and training of mediators should be academic was a minority position, as we shall see in chapter 14.

Others argued the importance of establishing mediation as a separate 'profession', with its own area of knowledge and expertise, so that mediators could overcome the perspectives and practices that they had learned in other disciplines.[41] In chapters 8 and 9 we learned of some of the perspectives and practices that people from collateral 'professions' would need to overcome. The practitioners hoped that the establishment of mediation as a separate profession would make the transition from the mediator's first discipline to mediation more definable and complete. They argued:

> The time is coming when it is no longer viable to be a dedicated volunteer. ... It can't develop unless there is standardization. ... If we don't start looking at one model then it won't develop. People hang on to their [existing] skills and professional area. It needs developing as a new area. (out-of-court conciliator)

Others argued that professionalization is necessary in order to stimulate public demand for or to increase public confidence in the service:

> It might get more people going. (out-of-court conciliator)

> It would be a good thing if mediation became a profession in the sense that it could provide a living so we wouldn't have to do it as we are doing it at the moment - sort of part-time on a volunteer basis. Because you would also be able to acquire more experience. The more you do, the better you become. At the moment that is not possible. There is no money to pay people. The more it becomes a profession, the more people will use it. (out-of-court conciliator)

We find similar arguments in the literature.[42]

Many of the practitioners (twenty-seven)[43] argued, however, that mediation is too emotionally demanding for anyone to be able to provide the service on a full-time basis.[44] They said that:

> I don't think there is a person who has been born who could stand the pressure as a profession unless it was very restricted - two days out of a

41 See also: J. Howard and G. Shepherd (1987): 12; E. Koopman and J. Hunt (1983): 26-32; A. Milne (1987): 91, (1988b): 400. See also chapters 3, 5, 6, 8, 9, 11, 12 and 13.

42 A. Manchester and J. Wheaton (1974): 374; J. Pearson and N. Thoennes (1985a): 483. See also: L. Girdner (1987).

43 All comments in this section were either offered spontaneously or in response to the open-ended question: "Do you think mediation will become a profession in it's own right or do you envision it continuing to be a skill used by different professions?"

44 See also: S. Bahr, C. B. Chappell, A. Marcos (1987): 40; L. Gold (1985): 21.

> four day week, on the outside, maximum. (in-court conciliator)
>
> It is very hard work. It is unique. You are going through a negotiation process ... but the emotions are there. It's overwhelming. I'm a group therapist and I've been in therapy analysis and worked with people for years but .. I hadn't seen anything as powerful as mediation in years. (*Why is it more powerful than therapy?*) Because you are helping them dig that grave [for the marriage], and therapy is long term, on going. If it breaks down you know they are going to come back next week. You don't tread where it is uncomfortable unless you know you are going to see them again. And you can prepare them for it. Whereas here you are just right into it. (out-of-court conciliator)
>
> I suppose it could be developed into a profession. That would be good. But it needs to be secondary. To do it well - I don't think you could do it full time. I think you need to do a fair amount to do it well, but I don't envision you could do it non stop, nine to five, because you wouldn't be giving people your best. It is very draining. A two hour session is - you can feel quite like a sponge. It is very painful. If we are talking about getting someone doing it nine to five you become like someone behind a DHSS desk. You loose sight of the people you are dealing with. I feel this situation is very important and it is important that it get the best possible attention. (out-of-court conciliator)

Others (twelve) stated that they would not like to see mediation become a profession because it would mean that people would not be able to provide the service on a part-time or volunteer basis:

> I think it would be a great pity to make it into another full-time profession - it is professional. I think it would be premature and perhaps not necessary. It is on the rim. It has considerable value as a part-time job. ... The danger is in limiting the part-time. If people want to do it full-time: OK, but part-time is something a great many professionals can do. If it becomes a profession then part-timers are out the window. ... What I am scared of is that it becomes so professional there wouldn't be room for others who couldn't do it full-time. (out-of-court conciliator)
>
> I think .. to have some people who are doing it professionally but I wouldn't want to lose the other people because there are so many - the problem with insisting that everyone has a certain standard of training is that you loose out on lots of valuable resources - people who are really good because of who they are - .. because they haven't done this course or that particular course. You have to think about admission criteria and so on and inevitably that is going to be about whether or not they can write essays or something. ... I would want some sort of balance really, .. because I think it important that people bring other things to it. (out-of-court conciliator)

Some members of this group also worried that professionalization would mean that people would begin to provide the service for the wrong reasons:

> With all professions you lose something. The trouble is, with professionalism, you become more concerned with your profession than with meeting the client's needs. Self interest comes in: 'I've got this skill and I can operate on you'. ... You take too much upon yourself with professionalization and that is a danger. (out-of-court mediator) [45]

As we saw in chapter 2 very few of Greater London's mediators devoted themselves to mediation on a full-time basis. This has also been the case in North America.[46] We seem to have more mediators willing to offer mediation than we have members of the public seeking the service, so it is likely that for the foreseeable future most mediators will continue to practice mediation on a part-time basis.

Practitioners were also worried that professionalization would mean the loss of cross-disciplinary fertilization and growth:[47]

> The experience of all different fields makes for different forms of conciliation. I wouldn't like to see a stereotype. Life experience is the most important. The more people who can be involved from different fields, the better. (out-of-court conciliator)

> If it [mediation] has a value, it is probably in it being brief and therefore limited and very focussed and I quite like that. I like doing different things in social work and that could get lost if it professionalized. And also there is a shortage of highly specialized people. I don't think one can visualize a time when people would give up years of their life to study and then become mediators. I think not, on the whole and I think it would be quite inappropriate. (out-of-court conciliator)

> If it becomes a profession, people will see it as a career and then you would loose a lot of people from other professions who would be barred by the fact that they cannot leave their own profession and join in. I would prefer it as it is now, where in spite of the fact you have a profession, one can join in and contribute to it. But in spite of the fact that we are professional in our respective fields, we must all go through formal training to have uniformity of ideas and know how to deal with conciliation. It should be a process which people in other disciplines would use. (out-of-court conciliator)

The practitioners raise some important issue here. They encourage us to remember that, while professional claims of exclusive expertise and the inclusion of methods and perspectives drawn from other professions may sometimes appear to threaten the cohesiveness, growth, and sometimes the very nature of mediation, it is the

45 See also: P. Elliott (1972): 104; A. Treacher (1987): 89.

46 For references see footnote 23.

47 See also: J. Folberg and A. Taylor (1984): 260; N. Kaplan (1984): 57.

cross-disciplinary sharing of knowledge and the critical cross-professional evaluation that make mediation vibrant and stimulating, that ensure its growth and change rather than its stagnation.

The other concern that the practitioners raised was the potential loss of mediation's influence on other 'professional' practices. For example:

> The work I have done with [named mediator] has helped me in my general practice because I have acquired an approach and the approach is - Whereas before I would have tended to become impatient with my time, I realize now that you have to be patient, that you can't unravel a situation which has been carrying on for years and festering and festering. You can't .. in a few weeks put a ribbon around it and say, 'Here it is'. It doesn't work that way. (out-of-court mediator/lawyer)

> I think what has happened with mediation, by the way, is that it has rubbed off on my adversarial practice. I think that actually is quite valuable and also I think it has rubbed off on my non-marital practice because I've used a quasi mediation scheme to help some franchise clients to resolve their corporate differences in a much more sensitive way when they were about to liquidate the company. So it does rub off. (out-of-court mediator/lawyer)

These practitioners tell us that, just as we can expect the mediator's 'professional' background to affect the type of mediation practised,[48] so also can we expect mediation practice to affect the practitioners' other work. The practitioners warn us that this influence might be lost if mediation were to exclude those engaging in other 'professional' practices.

Finally, the practitioners were concerned about the apparent conflict between the role of the professional and that of the mediator:[49]

> The problem with professional courses are the fact that they make people think they are experts which goes against the purposes of mediation. (out-of-court mediator)

> (*We first encountered the following quotation in chapter 5 when we were discussing the role of the mediator. It bears repetition here.*) Mediation, at its simplest level, seemed to be a good way of working out arrangements with the parties that were their [own] arrangements. That is the essence of it: that the choices and decisions are made by the people concerned rather than being imposed by a third party and that is the value

48 See chapters 8 and 9.

49 See also: R. Abel (1982): 303; G. Davis (1983a).

> underlying the mediation process and I think that is its very value. It is a simple notion: instead of someone making decisions about when access is to take place, you make your own decisions ... I don't believe in gurus or the notion of experts. .. [Mediation] need[s] skilled people but not the expert or guru. It is about giving power back to them. (out-of-court conciliator)
>
> I wouldn't like to see us swamped with a whole new profession of mediators. I'm not convinced the world needs them to that extent. It needs to be far better organized with certain levels of skill but not the bandwagon: 'We are the great mediators', along with the doctors, social workers and whoever. There are too many of us interfering in people's lives as it is it seems to me. (in-court conciliator)

In chapter 5 we saw that the practitioners questioned the appropriateness of the role of the expert in mediation. There we also saw that the expert role fits uneasily with mediation's concern to ensure disputant-autonomy. In chapters 5, 6 and 8 we saw that the practitioners emphasized the importance of mediators having respect for individual (or families of) disputants and for the disputants' right to make their own decisions. Are these attributes reconcilable with the attributes of a profession?

R. Strena and G. Westermark[50] found that mediators with professional, as opposed to administrative or conciliative, orientations were the most likely to act like arbitrators. We also know that the sociological literature identifies expert rather than client or disputant control as a characteristic of professions. This would appear to support the views of those practitioners who worried about the conflicts between the role of the professional and the role of the mediator. Furthermore, some of the consumer research on social-work and therapeutic services tells us that clients often respond better to those who are not professionally trained.[51] There also seems to be some support for the view that disputants appreciate the lay or non-professional status of some mediators and the accompanying lack of treatment, direction, and assessment.[52]

The solution to this dilemma seems to lie with the term 'professional manner'. The practitioners' comments seem to indicate that what is needed are people who can

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50 (1984): 47.

51 I.e.: J. Fisher and H. J. Eysenck (1976): 88-96; D. Howe (1989); M. A. Jones (1985); Y. Stolk and A. Perlesz (1990): 45-58.

52 G. Zetzel (1985): 63.

approach family law disputes with competence and 'professional' objectivity[53] but without the assumption of the control and power one normally associates with expert and professional status.[54] If the essence of mediation is disputant self-reliance and freedom from professional and state control, why the need for professional status? The in-court mediator quoted above points out that there are already many legal, social work, therapeutic, and psychological experts who can provide direction and control should that be required.[55] Whether or not Greater London's practitioners favoured mediators having professional status, all agreed that mediators need to receive some sort of specialized education and training. The comments of the practitioners as a whole would suggest that specialized education and training programmes for mediators should promote competence, procedural expertise, and 'professional objectivity', but not expert or professional status.

Summary and Conclusions

Mediation in Greater London during the period 1987-1988 could not be characterized as a profession, yet it was attempting to come to terms with professionalization. The biggest obstacles to this process appeared to be the lack of stringent educational requirements for mediation practice, the lack of opportunity for full-time practice, the lack of public demand for the service, and the lack of disciplinary cohesiveness within the field. We have discussed aspects of the lack of cohesiveness in chapters 4, 5, 6 and 9 and the lack of mediator education in chapter 2. Here we discussed the efforts of mediation to circumvent some of these obstacles artificially: the lack of education by

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53 For an explanation of this term, see chapters 4 and chapter 8.

54 G. Davis (1988a): 65; S. Roberts (1986): 39.

55 The alternative is to ensure that mediators acquire the knowledge and skills of all the collateral professions to ensure that they can provide counselling, therapy, and give legal advice when needed. While, no doubt cross-disciplinary education and training are needed by all mediators, and while no doubt a person with all those resources would be a tremendous asset to a family going through the divorce and/or separation process; the role of the expert (whether legal advisor or therapist) is still in conflict with that of the mediator. Perhaps those with high levels of cross-disciplinary education might better put their expertise to work in other capacities.

imposing requirements that mediation practitioners have qualifications in (and thus the education required) by other disciplines; and the lack of public demand by making mediation involuntary. We concluded in chapter 9 that experience from other disciplines is as likely to be a hindrance as an asset to learning mediation. Thus we were able to find few reasons for limiting mediation practice to the members of any particular disciplines. We found that both mediation and law practitioners in Greater London had perceived a lack of public demand for mediation. This lack of demand is often blamed on lawyers, but we found here indications that there may be other, psychological, reasons why many people in the middle of family crisis are reluctant to engage in the process.

Some of the mediators in Greater London thought that mediation clients should be created by making mediation obligatory, an equal number were opposed to mandatory mediation. Upon reviewing the literature, we noted our inability to predict the success or failure of mandatory mediation in terms of agreement rates, but we did suggest that many things besides agreement rates must be considered, such as the implications of mandatory mediation on the public's rights of access to lawyers and to justice. We also noted that mandatory mediation appears to fly in the face of the disputant autonomy and free choice that have been identified as essential components of mediation.

When we looked at the mediation practitioners' views on the professionalization of mediation, we discovered a marked division of opinion. Some practitioners argued that giving mediators professional status would help to stimulate public demand. Others hoped that the lengthy educational requirements normally pertaining to professionalization would help to upgrade the competency of mediators by helping them to abandon the inappropriate methods and perspectives of their primary disciplines.[56] Other practitioners, however, were concerned about professionalization.

56 For discussion of some of these disciplinary obstacles, see chapter 9.

They considered full-time mediation to be inadvisable, given the degree of concentration and emotional energy required to be effective in the process. Others worried that professionalization would exclude competent, part-time, volunteer practitioners; or that it would lead to people providing the service for money and status rather than out of concern for clients. Finally, the practitioners were concerned that the expert status and power normally accompanying the meaning of 'profession' are inappropriate to the goals and objectives of mediation.

When we reviewed the research, the literature, and the goals and objectives of mediation, we found that indeed there did appear to be a conflict between the expert role of the professional and the facilitative role of the mediator. Taken as a whole, however, the mediators' views appear to be reconcilable. All hoped that education and training programmes would create mediators who were competent, and who had procedural expertise and professional objectivity. Most hoped that educators would teach mediators to approach dispute-resolution in a professionally objective manner, but without the assumption of professional or expert status and power. As we begin in chapter 11 to examine the practitioners' specific educational proposals, we shall assume these to the goals of mediator education and training programmes. If mediators are to fulfill facilitative, procedural roles rather than expert, directive ones, as the mediators have maintained throughout this study, then we can expect, if the mediators are to be consistent in their views, that they will suggest an educational concentration on procedural expertise in conflict-resolution. Let us begin our scrutiny of the practitioners' proposals for the content of mediator education, therefore, with an examination of the practitioners' views on the need for mediators to acquire procedural knowledge.

CHAPTER 11

The Fundamentals of Mediation: Learning the Philosophy, Norms, Values, and Methods

Introduction

Now that we have isolated the goals of mediation and of the education and training of mediators, and appreciate the professional, educational and experiential backgrounds of its practitioners, we can begin to assess the practitioners' proposals for mediator training in specific subject areas. We shall begin with a discussion of the importance of mediators learning the core skills of mediation: conflict-resolution knowledge, skills, and techniques. If the mediators' educational recommendations are to be consistent with their own understandings of mediation and with the mediation literature; we should encounter an emphasis on non-directive, dispute- or conflict-resolution skills. We should also find a lack of emphasis on therapeutic knowledge and skills, and greater emphasis on procedural than substantive knowledge. The mediation practitioners met these expectations. Their recommendations were, for the most part, firmly rooted in the requirements of the mediation process. The lawyers' recommendations were not. They tended to place primary emphasis on the importance of their own legal substantive knowledge.[1] In addition to protecting their own professional interests, the lawyers' recommendations seemed to reflect a misunderstanding of the mediator's role. The lawyers seemed to be assuming that mediators fulfill expert-professional, not facilitative roles.[2] If the goal of education is to produce mediators who can skillfully and competently perform the services described in chapters 4, 5, 6, and 7, it appears that we must accept the practising mediators' recommendations before those of the practising lawyers with respect to knowledge relating to the mediation process.

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1 L. Neilson (1990).

2 Ibid. For discussion of this distinction, see chapter 5.

As we explore the practitioners' recommendations, we shall focuss our attention on the reasons they gave for suggested inclusions, exclusions, and limitations. In particular, we shall look for connections between the education proposed and the role of the mediator. In keeping with this focus, we shall isolate areas of knowledge, rather than the specifics of the information required. During the course of the interviews the practising mediators were asked to rank the importance of selected subjects,[3] they were encouraged to give reasons for their answers but were not asked to specify the information needed from within each subject. It is doubtful that the majority of the mediators could have given full particulars of the specific information required in any event, given the limitations in their own education and training illustrated in chapter 2. Where possible we shall compare the practising mediators' recommendations with those of the family lawyers.[4]

Given the level of importance attached to conflict-resolution by the practising mediators and in the mediation literature, we expected to find a high levels of expertise reflected in the mediators' comments. This will not be the case. The mediators' own education in and understanding of conflict-resolution appeared to be lacking. Instead we shall find indications of continuing reliance on perspectives, skills, and techniques learned in their primary or first professions. This must be addressed in future training programmes.

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3 For research particulars, see chapter 1. For a list of the selected subjects offered during the course of the interviews, see Appendix A-2. The mediation practitioners were offered three rankings: essential, helpful, and not relevant. Often the practitioners chose to add intermediate categories. Thus they sometimes chose 'very helpful' instead of either 'essential' or 'helpful' or chose 'low priority' or 'low helpfulness' instead of choosing 'helpful' or 'not relevant'.

4 See footnote 3. The mediators were encouraged to qualify their answers and to make additions. They often did so. The lawyers were surveyed by questionnaire and thus had less opportunity to qualify or to add to their answers. They were also offered fewer subjects to consider (see: Appendix A-4 and L. Neilson (1990).

Mediator Education: The Procedural / Substantive Balance[5]

Let us begin our discussions with an examination of **Table 11-1**. **Table 11-1** illustrates the mediators' and family lawyers' rankings of the importance of selected subject areas for mediators. The mediators' views are followed by those of the family lawyers (in italics) whenever comparisons were possible.[6] The procedural and conflict-resolution subjects have been highlighted to emphasize their relative positions.

TABLE 11-1
Mediator Education: Mediators' and Family Lawyers' Ranking of the Importance of Selected Subjects For Mediators

	Essential	Very Helpful	Helpful	Not Very Helpful	Not Relevant	Total
Mediation Process	**90.1%(91)**	**9.9%(10)**	**0.0**	**0.0**	**0.0**	**101**
Interviewing Skills	**94.1%(96)**	**2.9%(3)**	**2.9%(3)**	**0.0**	**0.0**	**102**
Psychological Effects of Divorce	91.2%(93)	2.9%(3)	4.9%(5)	0.0	1.0%(1)	102
Lawyers:	*21.2%*	*20.5%*	*33.6%*	*17.8%*	*6.8%*	
Communication Skills	**91.0%(91)**	**2.0%(2)**	**7.0%(7)**	**0.0**	**0.0**	**100**
Negotiation Skills	**81.4%(83)**	**10.8%(11)**	**4.9%(5)**	**1.0%(1)**	**2.0%(2)**	**102**
Lawyers:7	*27.9%*	*27.2%*	*33.1%*	*8.8%*	*2.9%*	
Custody and Access Law	84.3%(86)	2.9%(3)	12.7%(13)	0.0	0.0	102
Lawyers	*77.6%*	*15.1%*	*5.9%*	*0.7%*	*0.7%*	
Positive Connotation and Reframing	**72.0%(72)**	**22.0%(22)**	**5.0%(5)**	**1.0%(1)**	**0.0**	**100**

5 At the beginning of the educational discussions the mediators were asked not to include financial considerations. They were asked to assume that they would be given all the financial resources they would need to set up any type of educational programme they desired.

6 The lawyers' questionnaire was kept as short as possible to encourage the lawyers to respond. Thus the lawyers were offered fewer subjects to consider. Subjects were chosen for inclusion in the lawyers' questionnaire if they were particularly important to the practising mediators, if the lawyers and mediators were expected to disagree about their importance, or if the importance of the subject appeared to be controversial.

7. In the SFLA questionaire the lawyers were asked about the importance of dispute-resolution skills. For further discussion, see L. Neilson (1990): 257.

Time Management	**71.7%(71)**	**21.2%(21)**	**6.1%(6)**	**1.0%(1)**	**0.0**	**99**
Appreniceship	65.7%(65)	19.6%(20)	8.8%(9)	5.9%(6)	0.0	102
Lawyers:	*28.2%*	*32.2%*	*28.1%*	*11.0%*	*0.7%*	
Child Development	71.3%(72)	12.9%(13)	14.9%(15)	1.0%(1)	0.0	101
Lawyers:	*12.4%*	*21.4%*	*33.8%*	*23.4%*	*9.0%*	
Professional Role Division	**67.0%(65)**	**16.5%(16)**	**13.4%(13)**	**2.1%(2)**	**1.0%(1)**	**97**
Communication With Children	**64.3%(54)**	**16.6%(14)**	**6.0%(5)**	**1.2%(1)**	**11.9%(10)**	**84**
Stress/Conflict Management	**68.7%(68)**	**12.1%(12)**	**18.2%(18)**	**1.0%(1)**	**0.0**	**99**
Body Language	**59.2%(58)**	**20.4%(20)**	**13.3%(13)**	**4.4%(4)**	**3.1%(3)**	**98**
Lawyers:	*5.7%*	*17.1%*	*33.3%*	*26.0%*	*17.9%*	
Recognition Marriage Over	48.2%(27)	28.6%(16)	8.9%(5)	5.4%(3)	8.9%(5)	56
Referrals	**42.6%(43)**	**30.7%(31)**	**22.8%(23)**	**1.0%(1)**	**3.0%(3)**	**101**
Lawyers:	*15.2%*	*19.3%*	*48.3%*	*13.1%*	*4.1%*	
Understanding Family Interaction	56.0%(56)	17.0(17)	20.0%(20)	3.0%(3)	4.0%(4)	100
Divorce Law	57.4%(58)	14.9%(15)	27.7%(28)	0.0	0.0	101
Lawyers:	*79.2%*	*14.1%*	*6.0%*	*0.7%*	*0.0%*	
Ethnic/Cultural Knowledge	45.0%(45)	27.0%(27)	20.0%(20)	6.0%(6)	2.0%(2)	100
Lawyers:	*13.8%*	*18.8%*	*41.3%*	*18.8%*	*7.2%*	
Correction of Communication	**54.6%(53)**	**16.5%(16)**	**27.8%(27)**	**01.0%(1)**	**0.0**	**97**
Ethics	55.4%(56)	13.9%(14)	9.9%(10)	11.9%(12)	8.9%(9)	101
Confidentiality & Privledge (Law)	60.0%(60)	9.0%(9)	20.0%(20)	0.0	11.0%(11)	100
Recognition of Family Role Problems	46.0%(46)	17.0%(17)	31.0%(31)	2.0%(2)	4.0%(4)	100
Child Abuse Law	53.0%(53)	8.0%(8)	31.0%(31)	05.0%(5)	3.0%(3)	100
Lawyers:	*29.7%*	*20.7%*	*26.2%*	*15.9%*	*7.5%*	
Crisis Orders	46.5%(46)	13.1%(13)	35.4%(35)	05.1%(5)	0.0	99

Recognition of Child Behavioural Problems	45.1%(45)	10.8%(11)	30.4%(31)	9.8%(10)	3.9%(4)	102
Conflict[8] Theory	**35.5%(27)**	**27.6%(21)**	**25.0%(19)**	**6.6%(5)**	**5.3%(4)**	**76**
Lawyers:	*12.9%*	*16.5%*	*37.6%*	*25.9%*	*7.1%*	
Other Dispute Resolution Methods	**31.7%(32)**	**23.8%(24)**	**29.7%(30)**	**11.9%(12)**	**2.9%(3)**	**101**
Other Mediation Models	**19.2%(19)**	**35.4%(35)**	**36.4%(36)**	**5.1%(5)**	**4.0%(4)**	**99**
Mental Illness	39.0%(39)	14.0%(14)	21.0%(21)	2.0%(2)	24.0%(24)	100
Communication Theory	43.8%(35)	7.5%(6)	35.0%(28)	8.8%(7)	5.0%(4)	80
Law & Step-parents	28.3%(28)	21.2%(21)	49.5%(49)	01.0%(1)	0.0	99
Family Systems Theory	34.3%(35)	8.8%(9)	27.5%(28)	14.7%(15)	14.7%(15)	102
Lawyers:	*4.4%*	*12.2%*	*33.3%*	*33.3%*	*16.7%*	
Counselling Skills	**31.7%(32)**	**10.9%(11)**	**34.7%(35)**	**11.9%(12)**	**10.9%(11)**	**101**
Lawyers:	*41.1%*	*36.4%*	*17.9%*	*2.0%*	*2.6%*	
Marital and Sexual Problems	27.3%(27)	12.1%(12)	26.3%(26)	9.1%(9)	25.3(25)	99
Variation of Court Orders	30.5%(29)	6.3%(6)	57.9%(55)	2.1%(2)	3.2%(3)	95
Division Of Court Powers	21.2%(21)	15.2%(15)	45.5%(45)	2.0%(2)	16.2%(16)	99
Knowledge Of * Government Assistance Programmes	8.0%(8)	27.0%(27)	39.0%(39)	8.0%(8)	18.0%(18)	100
Maintenance * Law	28.4%(29)	3.9%(4)	45.1%(46)	0.0	22.6%(23)	102
Lawyers:	*87.4%*	*8.6%*	*3.3%*	*0.7%*	*0.0%*	
International Family Law	12.0%(10)	16.9%(14)	39.8%(33)	9.6%(8)	21.7%(18)	83
Family Law Contracts	19.8%(20)	1.0%(1)	33.7%(34)	0.0	43.6%(44)	101

8. Eighty-seven of the practitioners commented on the importance of conflict theory but I was only able to classify the responses of 76.

Property Div- * ision on Family Breakdown	13.7%(14)	6.9%(7)	54.9%(56)	0.0	24.5%(25)	102
Lawyers:	*86.8%*	*9.3%3.*	*3%*	*0.7%*	*0.0%*	
Behavioural Modification	9.1%(9)	10.1%(10)	25.3%(25)	11.1%(11)	44.4%(44)	99
Role Play	8.3%(4)	8.3%(4)	18.8%(9)	12.5%(6)	52.1%(25)	48
Treatment of Dysfunctional Interraction	**8.0%(8)**	**8.0%(8)**	**39.0%(39)**	**7.0%(7)**	**38.0%(38)**	**100**
Budgeting and * Knowledge of Living Costs	6.1%(6)	9.2%(9)	23.5%(23)	6.1%(6)	55.1%(54)	98
Childhood Disabilities	5.4%(5)	8.6%(8)	41.9%(39)	16.1%(15)	28.0%(26)	93
Psychotherapy	3.3%(3)	9.6%(9)	41.3%(38)	15.2%(14)	30.4%(28)	92
Lawyers:	*1.6%*	*8.8%*	*26.4%*	*41.6%*	*21.6%*	
Treatment of Family Role Dysfunction	**5.0%(5)**	**5.0%(5)**	**23.0%(23)**	**11.0%(11)**	**56.0%(56)**	**100**
Valuation *	5.0%(5)	4.0%(4)	17.8%(18)	5.0%(5)	68.3%(69)	101
Income Tax *	7.8%(8)	1.0%(1)	31.4%(32)	5.9%(6)	53.9%(55)	102
Lawyers:	*77.8%*	*15.7%*	*5.9%*	*0.7%*	*0.0%*	
Inheritance * Law	6.1%(6)	2.0%(2)	10.2%(10)	23.5%(23)	58.2%(57)	98
Adoption Law	4.0%(4)	2.0%(2)	50.2%(50)	0.0	43.4%(43)	99
Evidentiary Law	3.0%(3)	3.0%(3)	11.1%(11)	12.1%(12)	68.7%(68)	97
Treatment Child Behavioural Problems	**04.0%(4)**	**8.9%(9)**	**7.9%(8)**	**79.2%(80)**	**0.0**	**101**
Game and Role Playing	2	0	1	-	49	52

* **NOTE:** *The mediators gave all subjects followed by '*' much higher ratings when they considered global mediation.*

In **Table 11-1** we learn that items of procedural knowledge were given very high, often the highest, rankings. The only exceptions to this trend were procedural matters the practitioners considered to be outside of the scope of mediation: those, for

example, relating to therapy, treatment, or counselling.[9] These will be discussed in chapter 12 during our discussion of the importance of mediators acquiring mental-health knowledge. We note immediately that all procedural subjects connected to dispute- or conflict-resolution were given high priority, while those relating to therapy were given low priority. Let us turn now to an examination of the practitioners' comments.

Mediation Process And Knowledge Of The Different Mediation Models

For purposes of analysis, the 'mediation process' and the 'other mediation models' categories will be discussed together. Not surprisingly, fully 100% of the mediation practitioners considered it important for beginning mediators to be taught how to deliver mediation. In the mediation literature we find that there has been some disagreement about the need for mediators to have specialized training in mediation.[10] Greater London's practitioners were unanimous in their endorsement of the need for such training. This does not mean, however, that they, themselves, had all had received adequate training in this area. During the course of the interviews 42 of the practitioners, including the 12 court-welfare officers mentioned in chapter 2, spontaneously complained about their own lack of educational preparation for mediation practice. For example:

> (*We first encountered the following comments in chapter 3. They bear repetition here.*) What training is there? ... What we do is start and then perhaps get training as we go along ... You are expected, I suppose, to use your social work skills because that is the training we have had ... It is partly what is needed but I think there should be more training in conciliation techniques as such. It would be very useful indeed ... I would have liked to have observed for a while before I had to do it. In fact I think I observed one morning ... and that was all and then right in ... No one has told me how to do this job and I don't know what I am supposed to be doing. (in-court conciliator)
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> I don't think there is much training. There doesn't seem to be any national mediation training service. Usually people try their hand at it.

9 The practitioners' views about the relationships between counselling and therapy, and mediation are discussed in chapters 6 and 12.

10 See: Department of Justice (1988c): 49; M. Elkin (1985): viii; A. Elwork and M. Smucker (1988): 27; Koopman (1987a): 123.

> They think they are mediating but you need a lot of training not to counsel, because you can get into that trap. You have to be impartial and not counsel. (out-of-court conciliator)
>
> There hasn't been much training. We've all had to feel our own way and it is so wrong. (out-of-court conciliator)

And another nine practitioners,[11] without solicitation, said that they, themselves, wished they had more training in mediation. For example:

> #1: I'm already aware - we are talking about something which is really very technical and my work is not technical. It makes me feel I'd like to have more training. #2: That is right. I feel if we were really being trained - I did a little when we first started - because I felt completely at sea. So I went and read one or two books, which I've probably forgotten, but had there been a really technical training ... #3: Yes, because social workers are trained, not in hard nosed negotiation, and if that is what you mean then certainly we need it. To some people it comes naturally anyway, but yes, the more skills we acquire the better. (three in-court conciliators)
>
> Are you kidding? [Training in conciliation] is almost nonexistent. There is the odd little course here and there. All of us, including the registrars, should have a core training. Now it is too idiosyncratic. The Registrars very definitely need some training. We should train together. All of us need a particular training [for conciliation]. (in-court conciliator)

We first discovered that many of the mediators lacked extensive training in mediation in chapter 2.

While education in the mediation process was given the highest priority, few (10) practitioners offered additional comments, making it difficult to identify the views of the majority on the matters to be included. Those who did comment spoke of the need to teach beginning mediators the differences between mediation on the one hand, and therapy, counselling, and social-work on the other. Or they spoke of the need to teach beginning mediators how to structure mediation sessions. The mediation research literature supports the latter assertion. We find that disputants think structure an important element in mediation's success and that indeed there does appear to be a positive relationship between structuring the process and mediation's success.[12]

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11 During the interviews the practitioners commonly commented that they, themselves, would like additional training in certain areas. For a list of the subjects sought by four or more practitioners, see Appendix A-5.

12 W. Donohue, M. Allen and N. Burrell (1985): 87; W. Donohue, J. Lyles and R. Rogan (1989):

While knowledge of the mediation process was given highest priority, knowledge of the types of mediation models ('other mediation models') was assigned lower importance. The latter subject has been given more priority in the mediation literature.[13] An examination of the practitioners' views about the importance of mediators learning different mediation models may help to clarify the practitioners' thoughts about the former subject. As we see in Table 11-1, only 54.6% of the mediators thought it important[14] to expose beginning mediators to the different styles of mediation practice. Many thought the subject too confusing for beginning mediators. They suggested instead that the subject be postponed until the beginners had first mastered one model:

> That [education in the competing theories and models of mediation] goes into your advanced course: the volunteers who take the course and then stick with it. We have a structure - and I couldn't [have] take[n] more [than that] on at the beginning. You need to get comfortable with one thing and then maybe later take more on. (out-of-court conciliator)

> Yes [an understanding of the different styles of doing mediation] is very useful. Mind you it is confusing and sometimes I think it is better to have someone train the mediator, who [already] has some experience with mediation. Then they can adapt and change but I think to begin with, it is better to begin with tunnel vision: this is the way we work. So train in one model first and leave training in the other models to later, after they have had some experience. (in-court conciliator)

In fact some of those who assigned high priority to this subject were clearly thinking of training after the beginning of mediation practise and not about preliminary training, for example:

> Yes. Yes, you need flexibility and it is important to be able all the time to reappraise what you are doing and the methods you are using - to stand back and see if there is some other way which could be tried. Also to stand back and say, 'Heh, we've changed' and hopefully the changes are for the best. ... It is essential, particularly for voluntary conciliation services, that there is a forum for continuing discussion and training and part of that should be a continual reappraisal of what you are doing. (in-

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26; W. Donohue and D. Weider-Hatfield (1988): 314; D. Saposnek, J. Hamburg et. al. (1984): 14; S. Zemmelman, S. Steinman, and T. Knoblauch: 32. See also chapter 5.

13 See also: M. Baker-Jackson, K. Bergman, et. al. (1985): 67; J. Lemmon (1985b): 19; Family Mediation Canada (1990b); L. Parkinson (1987a), (1987e): 192; (1987f): 19.

14 'Very Helpful' and 'Essential'.

court conciliator)

Thus many of those who gave this subject a moderate or low ranking, did so only because they did not think the subject should be taught prior to the beginning of practice, not because they considered it unimportant.

Most of the practitioners thought that initial training should be limited to a thorough grounding in one mediation model. The problem with this approach is that, as we have seen in chapters 3, 5 and 6, and as we see throughout the mediation literature, there is still no agreement on the best model of practice. Yet as long as educators continue to teach beginning mediators to use different models and methods of mediation, the differences among the professionals in the mediation field are likely to continue. The best alternative would appear to be to concentrate on the common ground, on the education and training that all consider important.

We saw in chapters 4 and 6 that few of the mediators recommended the integration of therapy in mediation and that even fewer (3) recommended abandoning dispute- or conflict-resolution methods in favour of therapeutic ones. Most considered dispute- or conflict-resolution the basis of mediation.[15] Even the mediators who wished to include therapeutic processes wanted to add those processes to a dispute- or conflict resolution base. Thus the basic, common model would appear to be one of dispute or conflict resolution.

The practitioners' comments as a whole suggest the need to teach newcomers to mediation methods to structure mediation sessions, and non-therapeutic, dispute-resolution techniques.[16] Most thought it important to concentrate on teaching one

15 As we noted in chapter 6, when the practitioners advocated a dispute- or conflict-resolution focus, they were talking about the structure of the process as a whole. None thought mediators should prevent disputants from discussing the social, inter-personal, and emotional components of their divorce and family reorganization. Nor did any of the practitioners think mediators should fail to offer empathy, and acknowledge the importance of those matters. Nor did they think those matters should be ignored in the creation of the disputants' agreements. They did not think, however, that mediators should actively persuade disputants to focus on those matters; and most were opposed to mediators trying to therapeutically change the disputants or their families.

16 As we've mentioned before, this does not mean the techniques cannot be derived from the therapeutic disciplines, as long as practitioners do not rely on adapted techniques to the exclusion of new

general model to be used with the majority of disputants, leaving specialized models, and models on the periphery of mediation,[17] to optional, short-term courses following the mastery of basic mediation practice. The practitioners' comments suggest that the first model be rooted in dispute- or conflict-resolution and not in any of the various pursuits of the collateral 'professions'.

Interviewing Skills

The practitioners assigned high priority to the need for beginning mediators to master interviewing techniques. This view is in accordance with the mediation literature.[18] Many of the practitioners commented that this skill can only be learned through 'professional' practice or in apprenticeship. As we saw in chapters 8 and 9, some considered this subject so important that they recommended mediation training only be offered to those with prior 'professional' experience: [19]

> Yes, I think this comes into what you first asked me: what sort of person you want for a conciliator, and I said someone who is experienced. I think the experience you gain in interviewing as a probation officer and also as part of your social work course [is important]. .. That is what I was talking about - [the need for] an experienced welfare officer, not someone who is coming fresh off a course. By virtue of acting as a probation officer,[20] you will have been trained in interviewing people. (in-court conciliator)

> That is part and parcel of the social work or legal or psychological background. ... If [the person's] background is such that they are not into dealing with people, I would question whether they would be right for conciliation. (out-of-court conciliator)

When discussing this subject, the mediators said that they wanted newcomers

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ones; and as long as the adapted techniques lose their therapeutic nature.

17 'Models on the periphery of mediation' means models which use mediation as part of other pursuits, for example, family therapy, counselling, or the practice of family law.

18 See inter alia: M. Baker-Jackson, K. Bergman, et. al. (1985): 67; D. Camozzi (1987): 203-4; Family Mediation Canada (1986), (1990b); J. Fargo (1986): 3; R. Fisher and S. Brown (1988): 95; T. Fisher (1986b): 3; J. Haynes (1984a): 502; H. Irving and M. Benjamin (1987): 87; W. Maggiolo (1985): 141; C. Moore (1986): 128; A. Pirie (1985): 382; M. Robinson (1982): 19; SPIDR (1988): 15.

19 For discussion of the types of people the practitioners would wish to train to become mediators, see chapters 8 and 9.

20 Court-welfare officers are probation officers who have specialized in family work. Generally they were not usually invited to do family work until they have gained some probation experience with criminal matters.

to mediation to understand the importance of 'listening', or paying attention, not only to the disputants' comments but also to the matters not being expressed and to the matters underlying the manifest disputes or conflicts.[21] They also wanted newcomers to mediation to learn how to provide an appropriate forum for the disputants, including: the use of techniques to set people at ease, to establish rapport, to interact with people in crisis, and to exude an aura of competence without appearing officious or directive. In connection with these matters, they also wanted newcomers to be taught about the importance of dress, demeanor and the physical setting of the mediation sessions.[22]

Communication Skills

Ninety-one percent of the practitioners considered the development of communication skills and techniques vital to mediation. None of the practitioners thought them unimportant.[23] In chapter 12 we shall find that 'correction of communication' and 'communication theory' were given lower ratings: the former because of its potential overlap with therapy, the latter because of the practitioners' emphasis on practical as opposed to academic or theoretical learning. In chapter 4 we learned of the limits of the mediators' goals with respect to the correction of communication.

The mediation practitioners' emphases on the importance of new mediators being taught communication skills and techniques is in accordance with the views of other mediators and mediator trainers[24] and with the bulk of the mediation literature.[25]

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21 See also C. Moore (1986): 128.

22 In connection with setting, the mediators mentioned the need for all participants in the mediation session to be sitting at the same height; the need for the mediator(s) to be able to see all disputants clearly and without effort throughout the sessions; the need for the disputants to sit beside or diagonally rather than directly across from each other; and the need for the premises to be comfortable, relaxing and unofficial without being merely social and informal.

23 See also chapter 4.

24 J. Bercovitch (1984): 53; E. Koopman (1985a): 125; R. Tolsma and J. Banmen (1984): 56.

25 Some of the following authors suggest the need for mediators to learn communication theory, others the need for mediators to learn how to stimulate effective communication between or among the disputants, and still others the need for mediators to learn how to teach the disputants more effective communication skills. See, for example: M. Baker-Jackson, K. Bergman, et. al. (1985): 67; M. Barsky (1984): 57; D. Camozzi (1987): 203-4; O. J. Coogler (1977): 5; G. Davis and M. Roberts (1988): 81; J. Haynes (1984a): 502; K. Kressel (1985); J. Lemmon (1985b): 19, (1985a): 19; A. Milne (1985b): 79, (1984):

There are indications in the research that effective communication is one of the keys to effective mediation.[26]

Despite the high level of importance the practitioners attached to communication skills, most did not offer much guidance on what should be included in training, other than the need for mediators to know how to speak clearly and concisely. The few who commented more fully mentioned the importance of mediators recognizing and attempting to deal with dysfunctional communication patterns such as 'double binding'.[27] They also mentioned the importance of knowing how to communicate on the same level as the disputants:

> Yes [communication skills are important]. I was lucky when I qualified. I worked on a difficult slum area of London so I learned how to communicate with them. That is part of the skill - to know the language and to know how people think and talk and to use and recognize, not only this body language skill, but also when people say something which is really a code for something else. To know how to put people at ease and not to rush them. That is really a communication skill, isn't it? - And to accept their fury and let them sit there and not say a word if they want to. (consultant to a mediation service)

Or they mentioned the importance of mediators knowing how to stimulate the flow of information and communication between or among the disputants. They spoke of the importance of encouraging disputants to use 'I feel' rather than 'you' statements, for example, teaching the disputant to say 'We feel lonely and hurt when you stay out all night' instead of: 'You don't care about me or your children. All you care about are your so called friends'. We find this technique commonly mentioned in both the negotiation and the mediation literature.[28] Also mentioned was the importance of having the disputants state their desires, rather than their prohibitions; and the importance of the mediator knowing when and how to stem the flow of destructive

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56; C. Moore (1986): 144-169, (1983): 83; L. Parkinson (1987a); J. Walker (1986): 44-5.

26 N. Burrell (1987); K. Kressel (1987): 219; W. Donohue and D. Weider-Hatfield (1988): 315; J. Pearson and N. Thoennes (1988a): 71; but see: S. Rogers and C. Francy (1988): 44-5.

27 See chapter 12 for an explanation.

28 R. Fisher and S. Brown (1988): 97; R. Fisher and W. Ury (1983): 37; B. Landau, M. Bartoletti, R. Mesbur (1987): 54; D. Saposnek (1983): 70.

communication. Mediators often try to accomplish these changes in communication patterns by rephrasing disputants' comments (see 'reframing' in chapter 12). The hope is that the disputants will begin to copy the mediator's phrasing. If not, at least the comments are denuded of their negative, emotive content thereby allowing the other disputant to consider them.

These were the only examples of communication skills given to me by the mediators, besides those mentioned in connection with 'positive connotation' and 'reframing' which we shall be discussing in chapter 12, and those mentioned when the practitioners discussed the importance of preserving disputant autonomy in chapters 4, 5, and 6. The mediation and other dispute- or conflict-resolution, psychological, social-work, and therapeutic literature is full of examples of inter-disputant communication problems and methods that third parties can use to correct them. Many of those methods can readily be adapted for use in family mediation if they are made dispute-resolution or conflict-management rather therapeutic or quasi-adjudicative tools; and if the tools promote each family's right to privacy and autonomy. Perhaps it would limit the inter-professinal confusion if mediators and those who educate them were to disassociate communication tools from their disciplines of origin. They could then simply be referred to as 'mediation' or 'dispute resolution/conflict management' communication tools. The change in terminology would help to advance the development of a common family/divorce mediation language.

Perhaps, as W. Donohue and D. Weider-Hatfield suggest,[29] the essence of mediation is communication. After all, if the mediator is not using therapeutic or counselling tools;[30] is not advising;[31] is not adjudicating;[32] and is not negotiating;[33] it would appear that communication and the regulation of communication is the only tool

29 (1988): 297.

30 See chapters 6 and 103

31 See chapters 9 and 13.

32 See chapter 4.

33 The relationship between mediation and negotiation will be discussed shortly.

the mediator has.[34] The mediators suggest that educators concentrate on teaching mediators communication skills and techniques, and methods of teaching the disputants effective dispute resolution methods,[35] leaving legal, mental-health and social-work tools aside.

Dispute Resolution Theory And Skills: Negotiation, Stress or Conflict Management, and Conflict Theory

Introduction

When the practitioners offered their suggestions for mediator education in these three categories, their comments tended to overlap. Thus, we shall be discussing these subjects together.

Mediator training in negotiation was considered essential or at least very helpful by 92.2% of the practising mediators. Surprisingly, when the family-law practitioners were asked to rank the importance of mediators receiving training in this area,[36] only 55.1% considered the subject either essential or very helpful.[37] The lawyers' survey suggests, however, that the lawyers may have been confusing mediation with counselling or that they thought mediation a more directive process than did the practising mediators.[38] The mediation practitioners' views are in accordance with the mediation literature which gives mediator education in negotiation high educational priority.[39]

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34 The mediator may also exert pressure by claiming expert or administrative or even adjudicative power, but, as we saw in chapter 5, these practices limit rather than enhance mediation.

35 For further discussion, see the next section.

36 The lawyers were asked about the need for mediators to acquire dispute-resolution techniques. This term is broader than 'negotiation' and may have caused some confusion. The term includes negotiation but also other methods to get disputants communicating and negotiating with each other more effectively. See L. Neilson 258-60.

37 Ibid: 254-5.

38 Ibid: 258-60.

39 See the surveys of: E. Koopman (1985a): 125, 127; and R. Tolsma and J. Banmen (1984): 58. See also: M. Baker-Jackson, K. Bergman, et. al. (1985): 67; D. Brown (1982): 22; D. Camozzi (1987): 203-4; T. Colosi (1987): 94; Family Mediation Canada (1990b); J. Fargo (1986): 13; J. Haynes (1984a): 509; J. Howard and G. Shepherd (1987): 135; H. Irving (1980): 105; E. Koopman and J. Hunt (1987): 10; K. Kressel (1985): 289; J. Lemmon (1985a): 54; A. Milne (1984); 49; C. Moore (1983): 83; L. Parkinson (1986a): 252; H. Raiffa (1982): 24; L. Riskin (1982): 36; M. Roberts (1988): 6-7; S. Roberts (1979): 70; M. Wolff (1982-3):

The fact that the mediators considered negotiation expertise vital did not mean, however, that all the mediators were well versed in negotiation theories and methods. During the course of the Greater London interviews, twenty of the practitioners spontaneously mentioned their own lack of educational exposure to negotiation theories and techniques, and fourteen of these specifically stated that they wished they had more training in the area.[40] Furthermore the responses of many of the other mediators indicated a limited understanding of effective negotiation techniques.[41]

'Stress or Conflict Management' was given a high level of endorsement by 80.8%, and conflict theory by 63.1% of the mediators giving classifiable answers.[42] Only 29.4% of the family lawyers considered conflict theory important, again suggesting some confusion among the lawyers as to the nature of mediation.[43] Nineteen of the mediators spontaneously mentioned their own lack of education in conflict theory but only three mentioned a lack of training in stress- or conflict-management. This was partly because the latter category was often interpreted to mean the importance of the mediator being able to cope with stress, rather than an area requiring the acquisition of substantive or procedural knowledge; and partly because many of the practitioners were thinking of stress- or crisis-management and not of conflict- or dispute-management.

It is important to distinguish between these two sets of terms because, while some of the stress- or crisis-intervention skills can be adapted for the use in conflict- or dispute-resolution, others are therapeutic in nature and therefore only useful when including therapy in mediation. In chapter 4 we saw that most of the practitioners did

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40 See Appendix A-5. The others mentioned the subject's importance and their own lack of training but did not specifically say that they wished they had more.

41 I did not ask the mediators a specific question on their formal educational exposure to negotiation strategies and theories. My conclusion that the practitioners did not have much education in this area is speculative, based solely on the degree of knowledge they exhibited during the course of the interviews.

42 Answers were classified when the mediators ranked the subjects themselves or when their responses clearly indicated their views.

43 L. Neilson (1990).

not think the latter approach appropriate. No doubt mediators need to know how to manage, or to help the disputants manage, their crises and the stresses during the dispute/conflict resolution process. The crisis-intervention literature contains a great deal of information about interviewing methods one can use to help disputants *contain* or *alleviate* feelings of stress and crisis during the resolution process. Some of these can be adapted readily for use in conflict-resolution. Others are therapeutic. As we have seen, mediators should not be trying to *change* people's normal responses to crisis.[44] Even less should they be attempting to treat abnormal levels of stress and crisis.

It is difficult to assess the importances of stress- and conflict-management skills in the mediation literature because of the multitude of terms used, all having slightly different meanings.[45] Some authors endorse the importance of crisis- or stress-management skills,[46] others the importance of dispute-resolution[47] or conflict-management[48] skills.[49] To complicate matters further, most authors make little effort to identify the parameters or the use of the knowledge suggested.

Conflict theory is given more prominence in the mediation literature[50] than the practitioners' rankings would suggest. Only 63.1% of the mediation and even fewer of the law practitioners considered the subject important. We should note, however, a

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44 R. Becvar, D. Becvar, and A. Bender, (1982): 389. See also: chapter 6.

45 It would have been preferable had the mediators been asked separate questions on the importance of 'conflict management' and 'stress and crisis management'.

46 For example: M. Baker-Jackson, K. Bergman, et. al. (1985): 67; J. Fargo (1986): 14; F. Gibbons and D. Elliott (1987) 14; J. Greenstone and S. Leviton (1987) 39-54; J. Lemmon (1985b): 19; R. McWinney (1988): 33; L. Parkinson (1985c): 226; D. Saposnek (1983): 32; P. Weir (1979): S. Zemmelman et. al..

47 For example: H. Edwards: 683; L. Gaughan (1987): 115; M. Knowles (1987): 61; R. McWinney (1988): 41; S. Roberts (1983): 542-7.

48 For example: M. Baker-Jackson, K. Bergman et. al., (1985): 67; Family Mediation Canada (1990b); S. Grebe (1988b): 22; J. Haynes (1984): 502; E. Koopman (1985a): 127, (1987a): 1; E. Koopman A. Dvoskin, et. al. (1987): 7; L. Parkinson (1985b): 252, (1987f): 21; V. Solomon (1982-3): 673; P. Wehr (1979): xvi.

49 For a very useful definition of the differences between dispute-resolution and conflict-resolution and their relationships to mediation, see J. Folberg and A. Milne (eds.) (1988): 8.

50 See, for example: E. Koopman (1985a): 125, 127. See also: M. Baker-Jackson, K. Bergman, et. al. (1985): 67; F. Gibbons and D. Elliott (1987): 14; S. Grebe (1988b): 22; L. Parkinson (1987e); D. Pruitt (1981): 207; R. Walton (1969): 124; P. Wehr (1979): 51.

dislike of theories and theoretical learning in general. The lawyers gave all theoretical subjects low rankings.[51] Similarly, throughout the interviews, the mediators repeatedly expressed their dissatisfaction with theories and academic types of learning. We do not know whether this was because the mediators had determined these types of knowledge to be irrelevant to mediation, or whether the responses were independent of mediation. For example, perhaps many of the mediators working in Greater London during 1987 and 1988 were not academically inclined. Alternatively it is also possible that, if one were to interview practitioners from a variety of disciplines or occupations, one would always find a sizeable number suggesting the lack of need for theoretical or academic training, the need only to learn how to apply the tools of their trade.

If we look only at the mediators' rankings of the importances of the subjects associated with the work 'theory', we find that conflict theory received the highest ranking of all. Thus it appears the practising mediators suggest that, if theoretical knowledge is to be included in training, it should be centered on the study of inter-personal conflict. The mediation literature and the mediator educators suggest the need for mediators to study conflict in their training.[52]

The Relationship Between Mediation And Negotiation and The Need For Mediator Education In Negotiation

Before we look at the practitioners' comments about the need for mediators to study negotiation, we must first clarify the relationship of negotiation to mediation. If one looks at the mediation process as a whole, concentrating only on the behaviour of the disputants, it is clear that mediation is, in essence, a process of guided negotiation,[53] as

51 L. Neilson (1990): 254-5.

52 The authors can be divided into those who endorse the centrality of the study of dispute or conflict resolution, for example: T. Colosi (1987): 86; G. Davis (1982c): 123; E. Koopman (1987a): 119; and those who endorse the centrality of the study of negotiation, for example: J. Kelly (1983): 43; D. McGaffey (1987): 102; C. Moore (1986): 14; L. Rangarjan (1985); S. Roberts (1979): 70, (1983): 543-7.

53 See also: J. Kelly (1983): 43; D. McGaffey (1987): 102; C. Moore (1986): 14; L. Rangarjan (1985); S. Roberts (1979): 70, (1983): 543-7.

some of the mediators remarked:

> [Negotiation] was the word I was looking for. It is part and parcel of conciliation. (out-of-court conciliator)

> [Negotiation skills] I think [are] helpful, probably essential. We are learning the hard way. ... We could actually do with more. We've had a look at 'Getting To Yes'[54] but that is about all. It would be helpful to have more - some of the ACAS training - because a lot of our work is negotiation and this is where we differ so much from family therapy. (extract from a joint interview with two out-of-court conciliators)

> [You may need to get] them counselling, to bring them up to the level of ability where they can be flexible and rational, where they can see they sometimes have to give up things to get where they want to go. Some people simply cannot negotiate and they need to be taught how to do that: how to bargain and how to negotiate, because that is really what conciliation boils down to - finding a way whereby couples can perceive how they can negotiate. That is really what you are trying to do. [You are] trying to teach them how to negotiate. (out-of-court conciliator)

This does not mean, however, that the mediator engages in negotiation. The mediator's role of professional objectivity and impartiality[55] prohibits that role. Instead, as the mediation practitioners point out, the mediator attempts to guide the disputants' negotiations and the form of those negotiations in the direction of resolution: [56]

> Focussing on negotiation is important but you are not a negotiator per se. (out-of-court conciliator)

> [Whether or not mediators need negotiating skills] is a difficult question because the skill of a conciliator is to help the parties negotiate. So therefore, yes, it is essential that you have an understanding of the techniques of negotiation. (in-court conciliator)

It is difficult to envision how a mediator might fulfil this role without a thorough understanding of negotiation skills and strategies. The mediator needs to have extensive knowledge of the techniques which do or do not work in a bipartisan or multi-partisan negotiation process in order to assist. When the mediation practitioners

54 R. Fisher and W. Ury (1983).

55 See chapters 4 and 5 for a discussion of the meaning of 'neutrality' and 'professional objectivity' in mediation.

56 The research of K. Slaikeu, R. Culler, et. al., (1985): 55, suggests that the mediators who spend less time coaching the disputants on how to negotiate are more successful than those who spend more time. This does not necessarily mean that teaching negotiation is unhelpful in mediation, however, because it is likely that those who are resistant to learning new negotiation techniques are also those who have difficulty resolving their disputes.

emphasized the importance of negotiation, they also stressed the fact that the mediator's role is to teach and guide, not to negotiate. The mediator does not act on behalf of any of the disputants.[57] The mediator does not negotiate, the disputants do. The mediator's role is to attempt to change the disputants' style of negotiation from adversarial and confrontational to co-operative and integrative. Thus, although the mediator does not act as a negotiator, he or she needs expertise in negotiation. The mediator will need to know, for example, how to order the discussions so that resolution is encouraged, how the ordering should change in accordance with the level and type of conflict among the disputants.[58] The mediator must also know how and when to help the disputants consider their best and their worst alternatives to a negotiated settlement;[59] when to encourage the disputants to discuss the conflict as a whole and when to encourage the disputants to break it down into segments;[60] when and how to offer empathy and to acknowledge the importance of emotions and their ventilation;[61] how to keep the discussions focussed on the future rather than on the past,[62] and on the problem to be resolved rather than on the personalities involved.[63] The mediator will also need to be able to teach the disputants different methods they can use to resolve their disputes, for

57 The research suggests, however, that in practice some mediators act in a manner calculated to produce an agreement in accordance with the mediator's perception of the best resolution. See, for example: D. Greatbatch and R. Dingwall (1990): 53-64. See also: Appendix A-1 and chapter 3.

58 a) Research suggests the importance of matching conflict or negotiation strategies to the disputant and conflict type. See, for example: P. Carnevale, R. Lim and M. McLaughlin (1989): 214; J. Hiltrop (1989): 241; T. Kochan and T. Jick (1978): 229.

b) For information on ordering, see, inter alia: B. Erickson, J. Holmes, et. al. (1974): 303; R. Fisher and W. Ury (1983): 27; P. Gulliver (1979): 144-5; J. Hiltrop (1989): 252; D. Pruitt (1981): 205; L. Vanderkooi and J. Pearson, (1983): 562; W. Walker and J. Thibaut (1971): 1133; I. W. Zartman and M. Berman (1982): 183-7.

59 See, for example: R. Fisher and W. Ury (1983); R. Fisher and S. Brown (1988): 147; J. Lemmon (1985a): 54.

60 See, for example: D. Camozzi and A. Murray (1987): 88; B. Erickson, J. Holmes, et. al (1974): 293; J. Hiltrop (1989): 252; D. Pruitt (1981): 165; A. Salius and S. Maruzo 178; W. Walker and J. Thibaut (1971): 1113.

61 We find this advice throughout the mediation literature. See also the practitioners' views in chapter 4 and also: R. Fisher and W. Ury (1983): 31; I. W. Zartman and M. Berman (1982): 84.

62 We find this admonition throughout the mediation, the dispute resolution and negotiation literature. See, for example: R. Fisher and W. Ury, (1983): 54.

63 See, for example: R. Fisher and W. Ury (1983): 20, 28,56; R. Fisher and S. Brown (1988); E. Koopman and J. Hunt, 'Relational' 10; P. Wehr, (1979): 61.

example, broadening the number of available options; building or designing new solutions by integrating the interests and/or needs of all of the disputants; trading concessions on matters of lesser importance for concessions on matters of greater importance; developing options which bridge the interests or positions of the disputants; and finally, when all else fails, bargaining or compromise.[64] The mediator will also need to understand adversarial and confrontational forms of negotiation in order to recognize and neutralize them when they occur in the mediation process.

Some authors have maintained that mediation is not negotiation, or that is not only negotiation.[65] Several of Greater London's mediators shared this point of view. These practitioners argued:

> [Negotiation skills are] not essential. We have never been taught it and it doesn't fall within the realm of our work.[66] (out-of-court conciliator)

> I don't know. You might be more effective as a non-negotiator and let the people get on with it themselves. (*Would it be important, then, in that case, to have negotiation skills so you can help them to negotiate?*) That sounds right but I wouldn't want to close the door on anything else. (in-court conciliator)

Those who dismiss the relationship between mediation and negotiation offer a number of explanations for their views. We have already discussed the first: the fact that, while the mediator guides the negotiations, he or she does not negotiate. Others emphasize the processes which occur in mediation before disputants can begin to negotiate with one another, for example: discussions to determine the disputants' readiness and abilities to negotiate; discussions to reach an agreement concerning the procedural rules to be followed in the mediation process; discussions with the disputants about their perceptions of the dispute or conflict to determine it's historical contexts, its

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64 See, for example: R. Fisher W. Ury (1983); R. Fisher and S. Brown (1988); D. Pruitt (1981); R. E. Walton (1969); I. W. Zartman and M. Berman (1982). This is not, by any means, intended to be a complete list of authors nor is the list of tools in the text intended to be inclusive of all the negotiation tools needed by mediators.

65 See, for example: J. Folberg and A. Milne (1988): 8; H. Irving and M. Benjamin (1987): 94, 106.

66 As we can see by the ranking 'negotiation', very few of the practitioners shared this view.

intensity and complexity; discussions with the disputants to ascertain the types of relationships among them; and discussions to isolate the issues in contention.[67] While arguably these or similar processes are also part of most negotiation processes,[68] they are preliminary to the process that most people envision when they think of 'negotiation'. Others dismiss the relationship between mediation and negotiation because they fear claims by the legal profession to exclusive expertise, or because they do not appreciate the difference between 'bargaining' and 'negotiation',[69] or because they do not distinguish between adversarial, confrontational forms of negotiation, and negotiation as a whole.

Let us first examine the legitimacy of potential claims of expertise by lawyers. When we look at what family lawyers do,[70] we quickly discover that they spend a great deal of their time negotiating on behalf of their clients.[71] Thus it appears that lawyers can indeed claim expertise in negotiation. This claim is based on an initial appearance only, however. Let us look at the form of that negotiation experience. When the lawyer negotiates, he or she is acting in a partisan manner in an effort to gain the best possible position for his or her client.[72] The process works *because* each disputant's lawyer is acting in a partisan manner. In theory this ensures that the presentation of each perspective and interest is balanced by the presentation of an opposing perspective and interest.[73] Because lawyers have a duty to balance partisan interests, the negotiation

67 See also: J. Blades (1984): 65-7; D. Brown (1982): 9; D. Camozzi and A. Murray (1987): 88-9; A. E. Cauble, N. Thoennes, et. al. (1985): 30; C. Cramer and R. Schoeneman (1985): 38; J. Folberg (1985): 415; J. Haynes (1986a): 4; J. Kelly (1983): 43; C. Moore (1983): 85-6, (1988): 258; L. Parkinson (1986): 93-4; M. Roberts (1987): 56-7; V. Solomon (1982-3): 670-671; A. Taylor (1981): 4; L. Vanderkooi and J. Pearson (1983): 558. Note the similarity of the stages of mediation the authors identify and the stages of a professionally assisted negotiation process.

68 See footnote 67. See also, for example: R. D. Borgman (1978): 54-6; P. H. Gulliver (1979): 126-170; J. Haynes (1984b): 3; C. Moore (1988): 257.

69 Negotiation includes but is not limited to bargaining. For further discussion, see, inter alia: P. H. Gulliver (1979): 70-71, J. Haynes (1984b): 3; H. Irving and M. Benjamin (1987): 85; M. Roberts (1987): 6-7.

70 For further discussion, see chapter 9.

71 Ibid.

72 This is a generalization. The family lawyer's role is discussed in more detail in chapter 9.

73 This assertion is merely theoretical because the statement assumes that the disputants have

tools they use are partisan, adversarial, and confrontational rather than co-operative and integrative. Lawyers have tended to use bargaining, trading, and compromise rather than integration and originality.[74] Most lawyers can claim, therefore, only partial and one-sided negotiation expertise.[75]

Family or divorce mediation is proposed as an alternative to the services that lawyers and the adversarial process already provide. This has led to an accentuation of the differences between the two types of services. Because mediation proponents associate the term 'negotiation' with the services provided by lawyers,[76] they tend to think of partisan negotiation and to ignore other aspects of the term when they think of 'negotiation'. Thus mediation is envisioned to be a very different process. In fact the negotiation literature does not usually countenance the use of partisan types of negotiation such as bargaining, compromise, and confrontation, because these have proven to be less effective,[77] and because their use often generates escalation of the conflict.[78] Instead, the negotiation literature suggests co-operative and integrative negotiation methods.[79] Although they are not always identified as such, we find examples of the use of these integrative negotiation techniques scattered throughout the international, labour, small-claims and family-mediation literature. The methods do not

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equal access to lawyers, that their lawyers have equal abilities, and that the disputants are equally able to withstand the psychological, financial, and social pressures of partisan negotiations and litigation.

74 For further discussion of the reasons lawyers tend to adopt certain forms of negotiation, and the changing nature of those negotiations, see chapters 9, 11 and 13.

75 See also: C. Moore (1986): 70. This is changing. Lawyers respond to the same social influences as do the other professions. They are therefore increasingly adopting techniques that are less adversarial and confrontational. Thus we now find lawyers acting for all disputants rather than for one side only; holding group meetings including all the lawyers and their clients to discuss the conflict and to encourage settlement; using neutral language in their correspondence; and including mediation services in their practices. See also footnote 72.

76 See, for example: J. Folberg and A. Milne (1988): 8.

77 The legal process incorporates many checks and balances on the uneven exercise of power by the disputants. The fact that adversarial forms of negotiation are not effective outside the formal legal process, therefore, does not necessarily mean that they are not effective within it.

78 J. Bercovitch (1984); M. Deutsch (1987); R. Fisher and S. Brown (1988): 46-7; R. Fisher and W. Ury (1983): 5; C. Liebman (1987): 33-4, 40-41; P. H. Gulliver (1979); D. Pruitt (1981): 67-73, 120, 181; H. Raiffa (1982); I. W. Zartman and M. Berman (1982): 13.

79 See authors footnotes 63, 64, and 68, and also: E. deBono (1985); V. Kremenyuk (ed.) (1991); P. Wehr (1979).

'belong' exclusively to the legal profession or to any of the other 'professions' thought to be collateral to the practice of family mediation. Perhaps, however, in order to quell professional jealousies and fears, particularly the fear that lawyers will claim ownership of mediation, and in order to keep clear the distinction between mediation and negotiation, it would be preferable to call the methods and techniques 'dispute- or conflict-resolution tools'. Perhaps there would be less worry about the implications of acknowledging the importance negotiation if these tools were clearly differentiated from the services lawyers provide.

Conflict Resolution: The Practitioners' Own Expertise and Suggestions For Mediator Training

Throughout this discussion we have seldom referred to the practitioners' comments. Despite the high priority given to the importance of conflict-resolution techniques, very few of the practitioners offered any guidance on what should be included in mediator's training. A few commented on the importance of understanding interest- as opposed to principle-based negotiation,[80] and a few mentioned the importance of not tackling the resolution of the most difficult disputes/conflicts first.[81] Others appeared to equate 'negotiation' with 'bargaining':

> Yes, [negotiation is] very important. That is where mediation comes in: [the mediator says] 'She has given this bit, what can you give?'. It comes in. Yes, it can be essential actually. (out-of-court conciliator)

Those who discussed the importance of tools to manage the conflict or stress of the disputants[82] spoke of the need for mediators to learn how people respond to

80 See: R. Fisher and W. Ury (1983); R. Fisher and S. Brown (1988); E. Koopman and J. Hunt (1987): 10; J. Lemmon (1985a): 48; C. Moore (1988): 260; D. Pruitt (1981).

81 It is generally accepted that it is not a good idea to start negotiations with the most difficult issues, that it is better to begin with some of the easier issues in order to establish an atmosphere of success and co-operative problem solving. The research also suggests, however, that mediators should not leave the most difficult issues to the end of the sessions, particularly when conflict levels are high. See footnote 58 (b).

82 When the practitioners were asked about the importance of mediators learning how to manage stress and crisis, seven of the practitioners took the question to mean the importance of mediators learning to cope with their own stress. Sixty-nine of the practitioners ranked the subject but did not offer

crisis, how to structure interviews, and how to help the disputants manage their own stress and sense of crises. For example:

> Oh, yes [you need stress management tools]! You have to be able to recognize it, deal with it and absorb it. Sometimes you have to soak up some of the aggression, some of the stress, soak it up yourself to reduce the tension, without getting upset yourself. If you can't do that, you shouldn't be sitting in a conciliator's chair. (out-of-court conciliator) [83]

> Yes, that is very important: the management and control of stress. Yes, it is really about structure, control, and boundaries. Yes, it must be built into the process. [84] (out-of-court conciliator)

When asked about the importance of conflict theory, the few who endorsed the subject and offered suggestions, suggested that mediators be taught how people respond to conflict as well as conflict management skills and techniques:

> Yes, how to deal with conflict. I would put that in the core of the course. It is the very basis of what we are doing. (in-court conciliator)

> Now that is useful: what does a person trying to manage conflict do, what can they say at a given time to reduce that conflict! (in-court conciliator)

The mediators' comments reflected an aversion to theoretical and academic forms of learning:

> I'm not sure what conflict theory is. No, we don't need that. We need lots of practice with dealing with conflict. (*So not the theory*?) No, but various techniques of dealing with conflict. I don't think you necessarily need to know the various causes [of conflict]. [You need] conflict techniques, role play. The more you have done the better. (in-court conciliator)

> [You need] a working knowledge but you have to have a pretty good idea. A focus on conflict management would be very helpful, say for three days, if it was pretty practical and [the training should be] experiential rather than reading a pile of papers. Conflict management can be very helpful. (in-court conciliator)

It is clear here that these mediation practitioners were emphasizing the importance of

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additional comments.

83 See also: D. Saposnek (1983): 32.

84 This practitioner is talking about containing conflict and the stresses and senses of crises it creates, by establishing rules and boundaries in the mediation process. At another point in the interview he, along with the other practitioner quoted, spoke of the need for mediators to know how to neutralize stress or crisis when faced with these during the mediation sessions. Presumably mediators need to know how to do both.

conflict-management and dispute-resolution tools and not conflict theory. There is a wealth of theoretical literature on the origins, functions, and stages of conflict in the sociological, anthropological, social-psychological and dispute/conflict resolution literature. The mediators appeared to be either uninterested in or unfamiliar with these.

In spite of the importance that the mediation practitioners assigned to the need for mediators to learn dispute resolution and conflict management tools, it appeared during the course of the interviews that most of the practitioners were not well versed in negotiation, in conflict management or in dispute resolution theories or techniques.[85] For example, when the practitioners were asked how they handled power imbalances or people who attempted to exert pressure on the other disputants during mediation, eleven could not give an answer and another fifteen gave as their first or only answer that they would tell the steamroller to 'shut up'.[86] For example:

> I tend to be direct and say, 'Shut up!'. (in-court conciliator)
>
> If they said something that was grossly unfair, I might say, 'No, that is nonsense'. (out-of-court conciliator)
>
> The way I try initially is to say, 'you are acting like a steamroller. Your husband is finding it difficult, I am finding it difficult. Let's talk about how long you've been talking and how little listening'. I do that all the time, I say, 'You are talking too much. You are being overbearing'. (in-court conciliator) [87]

Another eleven responded with techniques they explicitly identified as having been drawn from their primary professions.[88] For example:

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85 See also: G. Davis and K. Bader (1985b): 84.

86 A full analysis of the practitioners' responses to this question will be provided elsewhere. Some of the useful strategies suggested were: the balanced enforcement of mediation ground rules, making the power balances explicit and discussing them openly in the sessions, feeding back to or drawing out the disputant with less power, the use of referrals to outside experts, making apparent the powers of the weaker, provoking escalation of the conflict to force unspoken conflicts into the open, and supporting the confronting disputant to enable him or her to put his or her positions and interests forward less forcefully.

87 At another point in same interview the same practitioner said:

> My fantasy is that if you learned dispute resolution skills, you would not use pressure. (in-court conciliator)

See also: D. Greatbatch and R. Dingwall (1990).

88 For an occupational and experiential breakdown of the backgrounds of the mediators, see chapter 2.

> [*How do you handle a power imbalance or the situation where one disputant is overpowering or steamrolling the other?*] Well this is better if you are four [two conciliators and two disputants]. You can control it by being a counsellor. The one who is representing the weaker person can build up their esteem and give them support. (out-of-court conciliator) [89]
>
> I would use a casework technique, depending on time. [I would] start from the origins [and ask] why is it that some can separate without problems and others can't ... [and then I would ask myself] how I can aim at that - to counsel people to arrive at that. (in-court conciliator)
>
> Oh there are lots of strategies [to deal with power imbalances]. Actually lending your weight to the relatively powerless ones and certainly I would use some of my family therapy techniques, [such as saying]: 'Do you always let him talk for you?'. We point it out.[90] (out-of-court conciliator)

Still others gave answers that were weak or without substance. Only 95 of the mediators addressed this topic. Thus, more that 38% of the practitioners did not identify a single conflict-resolution tool that they could draw upon to deal with this common problem. A study of this kind tends to emphasize expertise rather than the reverse, because the best and most informative comments are commonly chosen for inclusion. In chapter 2 we learned that many of the mediators had limited educational exposure to subjects falling outside the parameters of their primary disciplines. In the areas of law and conflict-resolution, informative comments from the mediation practitioners were the exception rather than the rule.

Many of the mediators appeared to be trying to emend techniques learned in other disciplines to suit mediation, rather learning and incorporating new techniques. We shall encounter this trans-disciplinary process again in chapter 12, when we discuss the mediators' views on the need for new mediators to acquire mental-health knowledge. When the mediation practitioners discussed negotiation and conflict studies, it appeared that, while these subjects were considered to be extremely important, a large number of the mediators had not yet become fully apprized of them. Prior 'professional'

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89 For a discussion of the differences between counselling and mediation, see chapter 12.

90 During the course of their discussions about appropriate methods to use in cases of power imbalance, other practitioners voiced complaints about the use of family-therapy techniques such as alliances with the disputant having less power because the technique alters the mediator's facilitative, neutral role.

knowledge appeared to be being relied upon preventing the mediators from acquiring new knowledge. This phenomenon lends support to the claims of those who say that prior 'professional' experience can in fact be a drawback for beginning mediators.[91]

This does not mean that members of the collateral professions should be excluded from mediation training. The fact that some of the mediators appeared not to have made the transition from their primary 'professions' to mediation can be explained in part by the amount of preparatory mediation training they had received. In chapter 2 we learned that a large number of the practitioners appeared to lack mediation training. Not one of the sixty-six mediation practitioners who commented on the issue[92] considered the preliminary education and training available to mediators in England in 1987 and 1988 adequate.[93] The practising family lawyers held similar views.[94] The mediators' comments suggest that it is an error to assume that the skills of the collateral professions can be transferred to and are adequate for mediation practice. It becomes clear that educational attention needs to be focussed on conflict studies and on conflict-resolution so that the trans-disciplinary processes used by mediation practitioners can be precluded.

Positive Connotation and Reframing

'Positive Connotation' and 'reframing' are procedural tools that can be used for conflict-resolution or therapeutic purposes. For this reason our discussion of these techniques will be reserved to our discussion of mental-health knowledge in chapter 12. There we shall find that most of the mediators recommended the use as conflict-resolution tools. We should note at this time the high priority accorded to them.

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91 See chapter 9.

92 Sixty-six practitioners commented on the adequacy of mediator education and training in England in 1987 when asked to do so. Others said they were not aware of the education and training available.

93 For further discussion, see chapter 14.

94 See: L. Neilson (1990).

Time Management

The importance of mediators knowing how to use time during the mediation sessions was also given a high priority by the practising mediators.[95] Table 11-1 informs us that 71.7% considered the topic vital and another 21.2% very helpful. Specifically the mediators were asked about the importance of mediators learning how to use time pressure and time constraint.[96] Certainly an awareness of time limitations was vital to those working within the confines of in-court programmes:

> That [knowledge of how to use time pressure and time constraint] must be essential, especially here, where time is limited. I have to decide fairly quickly whether or not there is an opportunity for conciliation. If not, I turn and say that quickly to the parties and we go back to the registrar for directions - [so we can] devote more time to those who need it - because it is not helpful to them to devote time if it not productive to them. (in-court conciliator) [97]

Many of the mediators, both those working inside and those working outside the courts, mentioned how effective time limits could be in getting the disputants to work at resolution:

> I feel that [knowing when and how to use time constraint and pressure] is very important ... As a general rule, the most important bits come out in the last ten minutes, when they have their hand on the door. I personally set a time limit and say, 'I can't stay beyond a certain time', and it is amazing how, having messed around for an hour, they will suddenly galvanize into action as they see you looking at your watch. (out-of-court conciliator)

We should note, however, that in spite of the fact that time pressure can produce agreements, agreements obtained under time pressure are not always truly consensual or integrative in nature.[98] The literature also tells us that time pressures can sometimes move the disputants further apart.[99]

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95 See also: C. Moore, (1986): 239.

96 The sequence and exact wording of the questions was occasionally changed to accommodate the variety of comments from the practitioners. During the course of the interviews it became clear that the question should have been phrased differently, so that it did not suggest only these aspects of timing. The phrasing of the question may have caused some of the mediators to consider only the importance of time limits when they ranked the importance of this topic.

97 See also Appendix A-1 and chapter 3.

98 Ibid.

99 G. Bierbrauer, et. al. (1978): 85-6; D. Brookmire and F. Sistrunk (1980): 311; H. Irving, M. Benjamin, P. Bohm and Grant MacDonald (1981): 52; C. Moore (1983): 239; H. Raiffa (1982): 57-8; I. W.

Other mediators interpreted the question more broadly. They spoke of the importance of knowing how to structure mediation sessions, and of knowing when to intervene:

> Yes [an understanding of the use of time is] vital. We build in breaks sometimes. I did a conjoint session - .. I was doing the consulting and he was doing the interview. We were trying a new interview technique. .. I had structured a break with coffee and drinks for them and we were able to discuss what went on and how to structure the rest of the interview. It is those sorts of techniques we need to learn a lot more about. In [named service], where they had a [two-way] mirror, they had some very good techniques for planned interventions and how to focuss and highlight. I think that is an area that, in this office, we could look more closely at. (in-court conciliator) [100]

> That is very important. That is why when we sit in that room, we can all see the clock on the bookshelf. It is terribly important. You could, if you are inexperienced, let them rabbit on for hours because you think it is good for them when the main reason is you don't know how to stop it. [If you are an inexperienced worker you worry that] they may not like you, and you need to be liked, but it has to be structured. (out-of-court conciliator)

> You've got to know when to say, 'Let's bring these strands together', or you [need to be able to] sense when someone is about to move. Timing is very important. (out-of-court conciliator)

Or they spoke of the need to learn when and how to end sessions:

> [*Do mediators need to learn how to use time constraints?*] Very much so. An unskilled person will let them run on. I don't know how one learns it. Sometimes it is preferable to send them away - if you aren't going to be there to wind them down, it is preferable to send them away on a quiet note. Inexperienced people can misinterpret a lot of ventilation as being a good interview and it isn't necessarily a good interview. Some need time. (out-of-court conciliator)

> I don't believe in magical formulas but you [sometimes] reach a stage in conciliation where you feel you can't go any further and it would be counterproductive. If at all possible at the end of the session, even if there is no resolution, it is important that they go away with a feeling things are more positive. If you finish when all is blackness and bleakness then that is what they are going to take away. So at least if you can leave people with a sense, [for example]: we haven't made any decisions here but at least we've started talking. (out-of-court conciliator)

Another, experienced and knowledgeable mediator mentioned the importance of slowing

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Zartman and M. Berman (1982): 195-200.

100 For a discussion of the mediators' views on the use of video cameras and two-way mirrors, see chapter 6.

the speed of the communications between or among the disputants:

> [Near the beginning of the session you want to know] who is in what relation to whom. The key to starting the process is establishing the right speed. You have got to bring it back from 75 [revolutions per minute] to 33. Everything you do is to slow the process down - to give you time to think and to be imaginative. So everything you do: emphasizing the positives, the family sculpting, the [other] diversions are to slow the process down. Because the interaction between the couple is at the wrong speed ... The techniques have to do with pacing. (out-of-court conciliator) [101]

The mediators as a whole suggested that mediators need to know not only when and how to use time pressure in the mediation sessions, but also how to structure mediation sessions, when to intervene, how to regulate the pace of the disputants' interaction, and when and how to end each session. Presumably then, mediators should be familiar with the negotiation and conflict-resolution research and literature in these areas. One might expect the development of the skills and techniques to be perfected during apprenticeship and early mediation practice.

The Role Of Mediators and that of the Collateral Professions: Boundaries And Duplication

The practising mediators were asked about the importance of teaching new mediators about the differences between the roles of mediators on the one hand and the members of the collateral professions on the other. These differences have permeated much of our discussion. Not surprisingly then, fully 83.5% of the practitioners gave this topic high priority. Others have also mentioned the importance of mediator education in this area.[102] Basically the practising mediators wanted newcomers to mediation to understand clearly the goals, parameters, and limitations of the mediation process and to know when and to whom to refer clients who could better be helped by other processes. They also wanted beginning mediators to be clear about the differences between their

101 This mediator's comments are included here, not because they are representative of the practitioners' comments as a whole, but because they exhibit more than a rudimentary knowledge of dispute resolution/conflict management. As we saw in the last section, many of the other practitioners appeared to be lacking in this area.

102 Newcastle Report: 55; L. Parkinson (1987f): 22.

own roles as mediators and their roles in their primary professions.[103] In chapter 7 we found that this training might help practising mediators who have difficulty separating their own roles as mediators from the role of the disputants' independent legal advisors.

Knowledge of Community Resources for Referral

Throughout our discussions we have found practitioners referring to their own perceptions of mediation's boundaries with other professions in order to define the amount and type of knowledge required by mediators. The practising mediators commonly suggested limits on the knowledge required of mediators on the basis that the knowledge or expertise was available elsewhere. For example:

> Indeed we need to know [the referral resources in] our area: all the centres in the community and what they can offer. That ties in with what I was saying earlier. It is more useful for the mediator to have some idea of local resources in the various fields so they can refer, rather than having the knowledge themselves. It is important. (in-court conciliator)

If mediator education in the collateral fields is to be limited, effective inter-professional referral practices are vital.[104] It should not be surprising, then, to discover that the practitioners assigned relatively high priority to 'knowledge of community resources for purposes of referral'.

Slightly over 73% considered this training either essential or very helpful; another 22.8% found it helpful.[105] Those who gave this subject only a moderate or low level of endorsement were concerned that the information about referral resources would be difficult to obtain because their clients came from such a large geographical area; or they thought it necessary only to have the information available within the service. Most practitioners, however, agreed in essence with the following practitioner, that beginning mediators should receive at least a general overview:

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103 In chapter 2 we saw that most of the mediators did not list 'mediation' as their primary occupation.

104 See chapter 13 for a discussion of some of the problems connected to referrals to lawyers.

105 See also: E. Brown (1988): 135; J. Graham-Hall (1978): 12; S. Grebe (1988b): 17; J. Haynes (1984a): 500; E. Koopman (1985a): 128; A. Milne (1984): 56, (1985b): 79, (1988b): 395; L. Parkinson (1980): 140, (1987a): 148-9.

> Yes, yes, like marriage guidance. Or yes - and counselling, personal counselling or drug or even sexual therapy. Yes, I think that is important. You should know there are such things. I don't think you need to know [specifically] where they are, but you should have a back-up administrator who knows. Somebody [in the service] should know. For example Marriage Guidance[106] here not only does reconciliation, but also, once the marriage has broken down, they provide counselling for the divorced - some people are finding it [their divorce experience] horrific. And [our administrator] knows where they can go. But at least I know it is available. You need to know what is available, yes. (out-of-court conciliator)

If mediation services retain names, addresses, and telephone numbers of community referral resources, the mediator only needs to know about the types of services available. The development of lists of specific referral resources would appear to be best left to the mediation services or to individual mediators as they begin to practice.

In addition to knowing the types of services available to families in the community, the practitioners also wanted beginning mediators to be taught suitable referral techniques:

> The problem, again, is how to refer in a tactful way. There is a lot of work which needs to be done on the art of referral. It needs to be skilful and accurate. We get a lot of referrals here which are inappropriate just because someone didn't have anywhere else to send them. People get shoved around. .. People need to be given the right information. (out-of-court conciliator)

Four practitioners specifically, and without solicitation, mentioned that they would have liked more training in appropriate, tactful referral methods.

The Mediator And Training In 'Professional' Ethics

This area was given fairly high priority, with 69.3% of the practitioners ranking it either 'essential' or 'very helpful', but 20.8% of the practitioners ranked this subject 'low helpful' or 'not relevant'. Perhaps some of the practitioners did not understand the issues involved, for example:

> The conciliators have no responsibility to anybody other than the couple that they have. The only time there are ethical problems is where an offence is described and then we have got to work on that. That is the

106 Marriage Guidance is now called 'Relate'.

> only thing of that nature they [mediators] have got to have. (out-of-court conciliator)

Others were considering personal ethics when they answered the question:

> It is more to do with human character: integrity, warmth, decency. Those personal human characteristics are probably more important than professional ethics. (out-of-court conciliator),
>
> [Training in professional ethics is] Not essential. I would hope you would have people with ethical sense coming in the first place. (out-of-court conciliator);

or they thought the professional ethics of their primary 'profession' sufficient: [107]

> Yes, but it is not different from the ethics in court-welfare or probation services as a whole. I wouldn't have thought court-welfare officers needed a new set of ethics to do this sort of work. (in-court conciliator),
>
> We have professional ethics already. I don't see it as that different. (out-of-court conciliator);

or, finally, they thought ethical rules should be established on an agency by agency rather than on a professional basis:

> I think, really, that each conciliation centre has to adopt a certain philosophy. Each person must look at each agency to see if they can work there. I think too much examining and asking questions about whether we should be doing this this way or the other way is not necessarily very helpful. If people don't agree with a the center's philosophy, they can't work there. ... Ethics should be developed locally. I don't think you can impose them from a national organization. (out-of-court conciliator)

The majority of the practitioners, however, gave this subject relatively high priority. The mediation literature supports the views of the majority.[108] The practitioners who endorsed the need for mediator training in ethics suggested the following subjects be included:[109] discussion and examination of the ethical duty of the mediator not to be directive, and not to impose pressure; discussion and examination of the limits and dilemmas surrounding confidentiality; discussion of the problems posed

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107 Again we find a continuing affiliation with the practitioners' profession of origin rather than to mediation as a separate pursuit.

108 See also, i.e.: R. Crouch (1982): 237-250; Family Mediation Canada (1990): 4; E. Koopman (1985a): 125-129; J. Lemmon (1985a): 193, 215; A. Milne (1985b): 79; C. Moore (1983): 83; L. Parkinson (1987a); G. Walker (1988): 33; M. Wolff (1982-3): 213.

109 I have listed the topics in order of the number of times they were mentioned. Very few of the practitioners were lawyers. Therefore the ethical conflicts for lawyers who act as mediators were not addressed. For a brief comment on some of those see chapters 9 and 13.

for mediation if the mediator has had a prior professional involvement with the disputants in another capacity; study of the relevant codes of professional conduct;[110] discussion of the ethical duty of mediators not to engage in other processes such as therapy, without the informed, explicit permission of the disputants;[111] discussion and examination of the ethical dilemmas posed when mediators try to balance children's interests or differences in the disputants' power with the disputants' rights to autonomy; and finally discussion of the dilemmas faced by the mediator when the ethnic/cultural values of the disputants conflict with their own notions of legal and moral fairness.

Training In Other Forms Of Dispute Resolution

The practitioners were divided in their opinions about the importance of this subject. While 55.4% gave it high priority, 29.7% thought it only helpful, and another 14.9% did not think it important. Generally the practitioners thought beginning mediators should be taught something about the differences between mediation, arbitration, adjudication, negotiation; and between family and divorce mediation and the other forms of mediation: i.e., labour, business, community, and international. Many thought, however, that beginners could be given enough information on this subjects in a few hours and that the detail could be left for mediators to pick up during practice.

Conclusions And Summary

Throughout the practitioners' comments in this section we find three themes reoccurring: an emphasis on the need for mediators to acquire procedural expertise; an emphasis on the need to preserve disputant autonomy and power in the mediation process; and an emphasis on dispute or conflict resolution rather than therapy. We first encountered these themes in chapter 4 when we examined the role of the mediator. We shall find

110 J. Lemmon (1985a): 193 suggests that this discussion needs to include a discussion of the dilemmas created when the mediator's professional responsibility as a mediator conflicts with the 'professional' duties she or he has in her or his primary or other 'profession'.

111 See chapter 6.

the same threads continuing in chapters 12 and 13.

Six of the eight subjects receiving the highest rankings for their importance in mediator training were areas of procedural rather than substantive knowledge.[112] In particular, the practitioners wanted newcomers to mediation to be taught how to structure the mediation process; to be taught effective interviewing skills including active listening skills and methods to create appropriate forums for family dispute resolution; to be taught effective communication skills to stimulate the flow and effectiveness of the communication between the disputants; and to be taught negotiation skills and techniques. In addition they wanted beginning mediators to be taught how to summarize and rephrase the disputants' comments in ways likely to encourage them to resolve their disputes or conflicts, and to be taught how to regulate the timing and pace of the mediation sessions and their own interventions. They also wanted mediators to learn methods of communicating effectively with children; methods of handling and containing disputant stress during sessions; and dispute-resolution and conflict-management tools.

The practitioners gave low priority - often the lowest priority - to subjects connected to therapy. Instead they suggested an emphasis on dispute resolution, conflict management skills and models. This does not mean that the practitioners thought emotional matters should be disregarded,[113] only that they thought emotional matters should be considered in connection with the resolution of the dispute/conflict and not in their own right. The one exception to the practitioners' failure to endorse therapeutic change appeared, at first glance, to be in the area of communication. Techniques to 'correct communication' were given high priority by 71.1% of the practitioners. In chapter 4 we saw, however, that most disputants tied the use of those skills to the dispute-resolution process. They were not advocating skills to effect long-term

112 Interestingly one of the two substantive subjects was from the legal field and the other was from the mental health field.

113 See chapter 6.

therapeutic change. In keeping with this perspective we also found that conflict theory received a higher level of endorsement than any of the theories that the practitioners associated with therapy.

In chapter 6 we saw that one of the reasons the practitioners were reluctant to endorse the use of therapy or therapeutic methods in mediation was a concern over disputant and family autonomy. That uneasiness over the use of therapeutic methods persisted here. The practitioners' concerns about disputant autonomy also re-surfaced during discussions of the matters to be included in the mediator's training in 'professional' ethics. The matter mentioned most often (by eleven practitioners) was the need to explore with beginning mediators their duty not to apply pressure on disputants and not to be directive. Furthermore, most of the other topics suggested concerned the conflicts that mediators face between their various 'professional' duties as mediators: for example, their duty to protect the interests of children, and to balance disputant power; and their duty to promote and protect disputant autonomy. Greater London's practitioners suggested throughout their discussions that disputant autonomy is at the core of the mediator's normative outlook. If they are correct in this, then this norm should permeate the mediator's training.

In spite of the high levels of importance attached to the subject of dispute or conflict resolution, however, the practitioners' own levels of expertise in this area appeared to be lacking. The problem appears to stem partly from a derth of education and training programmes specific to these areas and partly from a continuing dependance on professions of origin. Many practitioners appeared to be emending techniques used in their first disciplines instead of acquiring new ones. This supports the opinions of the practitioners who argued in chapters 8 and 9 that prior professional experience may not in fact be as much of an asset to the beginning mediator as legislators and some of the mediation associations have assumed.[114] It also supports the

114 See chapters 9 and 10.

notion that experience from the collateral professions is not in itself enough to prepare people for the practice of mediation. Further specialized training in mediation appears to be warranted.

In addition to specialized training in mediation, do mediators require substantive knowledge? Do they need knowledge of the conflicts family-law disputants commonly submit to family mediators? Do they require knowledge of the social and psychological components of these conflicts; do they need to understand family law? If so, what levels of expertise are required? For answers to these questions we turn to chapters 12 and 13.

CHAPTER 12

Mediators and the Need for Substantive Knowledge from the Mental Health Disciplines

Introduction

If conflict resolution is to form the educational core, and disputant autonomy the normative core of the mediator's education and training, do family mediators need other education and training? In **Table 11-1** we saw that, while the practising mediators gave priority to procedural expertise, they did not discount entirely the importance of substantive knowledge. Two substantive subjects, one from mental-health and one from law, were also given priority. Did this reflect a departure from the mediators' belief in the importance of disputant autonomy? We shall find that it did not. Instead we shall find the mediators defining the limits and use of substantive knowledge in terms consistent with disputant decision-making and the mediation process. Here we shall examine the need for new mediators to acquire substantive knowledge from the mental-health fields. We shall discuss legal knowledge in chapter 13.

In chapters 4, 5, and 6 we saw that the practising mediators defined the mediator's role as procedural rather than substantive: the mediator guides the disputants through a conflict resolution process, he or she does not assume responsibility for the resolution of the disputants' problems. We wondered whether or not this definition would be reflected in the practising mediators' educational perspectives. Certainly in chapter 11 we found the practitioners recommending conflict resolution techniques and the norm of disputant autonomy as the core training needed by mediators. Here we shall find that, when the practitioners considered the need for substantive mental-health knowledge, they tended to emphasize procedural, rather than substantive components. We shall also find that when substantive knowledge was identified it was specific to divorce or family reorganization and to the mediation process. It was also narrower in

scope, shallower in depth, and often qualitatively different from the knowledge needed by practitioners of the mental-health professions.

In chapter 13, as we began our discussions of the practitioners' views on the need for new mediators to acquire legal knowledge, we shall need to consider the fact that very few of the practitioners had legal or financial backgrounds, or education and training in those areas. We encounter the opposite situation here. In chapter 3 we learned that 83.4% of the practitioners had primary occupations in social work, counselling, or related fields.[1] We also learned that many also had extensive 'professional'[2] experience in these areas. Thus the mediators had a wealth of educational and practical experience upon which to base their views. We must balance this, however, against any potential tendencies among the practitioners to stress the importance of their own areas of expertise.[3] Thus we would expect to find high levels of endorsement of the subjects discussed in this chapter. We must not forget, however, our discussions in chapters 4, 5, and 6 about the goals of mediation and the role of the mediator, and in particular the importance of disputant autonomy and the threats to disputant autonomy posed by therapy and child advocacy. Will the practising mediators be able to separate their roles as mediators from their roles in their primary occupations? How will their perceptions of the two roles colour their prescriptions for mediator education and training? Shortly we shall be exploring these issues on a subject by subject basis,[4] starting with the need for mediators to acquire knowledge of the 'psychological effects of divorce on family members', but first a brief look at the priorities the practitioners assigned to the mental-health subjects as a whole in **Table**

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1 83.4% of the practitioners listed one of the following as their primary occupation: court-welfare officer, social worker, marriage guidance counsellor, family therapist, probation officer, psychologist, social science lecturer/teacher.

2 I continue to use the term 'professional' in a general rather than in a technical sense. See chapter 10 for an explanation.

3 See discussion chapter 2.

4 We shall not be discussing each subject in detail. Instead we shall concentrate on the areas that typify the practitioners' views or that require further explanation.

11-1.[5]

When we review **Table 11-1** we find that the mental health subjects were not, as a rule, given highest priority. The mediators' rankings of the subjects appear to be in accordance with the goals and parameters of mediation as the practitioners defined them in chapters 4, 5, and 6. The practitioners' did not stress the importance of their own areas of expertise. On the whole, procedural knowledge was considered more important to the mediator than mental-health knowledge. Let us turn now to an examination of the practitioners' recommendations and comments on subject by subject basis, starting with the mental-health subject considered most important.

Psychological Effects Of Divorce Or Family Reformation[6] On Family Members

Fully 94.1% of the practising mediators considered it either essential or very helpful for mediators to receive training on the psychological effects of family reorganization. The family lawyers gave the subject much lower priority. In fact only a minority gave the subject more than a moderate rating. The practising mediators' views of the importance of this subject, rather than the views of the lawyers, conform to the bulk of the mediation literature.[7] Perhaps the lawyers' views reflect their own lack of knowledge in this area.[8]

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5 Most practitioners considered the degree of importance of the subjects as well as the breadth of the knowledge needed when they ranked subjects. On occasion the subjects were ranked from the practitioner's comments, when a particular practitioner discussed the relative importance of the given subject, but failed or forgot to specify a ranking.

6 The term 'reformation' is used rather than 'breakdown', because while it is certainly true that in many cases members of the original family go on to form new families and new relationships and in the process sever connections to the first family, it is also true that many newly formed families are able to incorporate relationships to family members from the past. In the latter cases the original family has not completely broken down but has changed from a relatively cohesive nuclear structure into a looser, bipolar one. The term 'divorce' was used in the questions and in Table 11-1 for the sake of brevity. It is unlikely that the collective psychological experiences of a reforming family will be different just because the parents never formally married.

7 See for example: E. Koopman (1985a): 118; D. Brown (1982): 22; R. Emery and M Wyer (1987b): 005; I. Gee and D. Elliott (1990): 99-100; F. Gibbons and D. Elliott (1987): 14; J. Haynes (1981): 16-17; E. Koopman, A. Dvoskin et. al. (1987): 7; M. Baker-Jackson, K. Bergman, et. al. (1985): 67; R. McWinney (1988): 41; L. Parkinson (1987a): 149; M. Robinson and L. Parkinson (1985): 367; A. Taylor (1981): 2.

8 See chapter 9 and L. Neilson (1990).

We should keep in mind here the practising mediators' own educational profiles. In chapter 3 we learned that, while a surprising number of the mediators had had little preparatory training, most had either attended lectures or workshops or had taken courses on the psychological effects of family reorganization on family members after starting to practice mediation. If not, they had done a fair amount of reading on the subject. This suggests that many of the practitioners had discovered the need for this knowledge in mediation practice.

Almost without exception, the practising mediators asserted the need for mediators to understand the emotional components of the divorce process:

> Yes. Essential. Because we have to interpret, not in a psychological sense, but when someone makes a comment, you have to hear that in terms of what you know about the divorce experience. The anger may be part of the bereavement and loss process rather than actually being anger over the issue. Yes, you need to understand what is going on. (out-of-court conciliator)

> It is a very important thing, because sometimes you can, in the course of conciliation, bring these factors forward because the people themselves are often so immersed in their own pain and hurt, they forget about how the children might react. It is very much a matter of bereavement. (in-court conciliator)

The practitioners also wanted mediators to be conversant with the research concerning the short and long term social and psychological consequences of divorce and family reorganization on the well-being of children and reorganized families; to know about the frequency and effects of family violence during the divorce process; and to be familiar with the literature and research on the advantages and disadvantages of various types of residential arrangements for children. In keeping with the practising mediators' lack of expertise in financial matters,[9] the practitioners did not mention the importance of mediators understanding the stresses upon children and their custodians caused by the financial deprivation which often accompanies family reorganization.[10] Presumably mediators might also benefit from some discussion of the research in this area,

9 See chapters 2, 3, and 7. See also chapter 13.

10 See chapter 7.

particularly those who would practice in the financial and property fields.

In accordance with the practising mediators' emphasis on the importance of disputant autonomy, (see chapter 4, 5, 6, 8 and 9) the practitioners introduced a cautions note about the use of this information. For example one mediator expressed disapproval of the following mediators' behaviour:

> Some of my colleagues forget that they are not doing a welfare report and then they might say, 'Well, I don't think much of that arrangement'. I have actually heard a colleague say, 'Well, I don't think that is a good idea. I think seeing the child once a week is too often. I think you should see the child once a month so that is what I am going to write down'! (in-court conciliator)

Instead, while most practitioners considered giving disputing parents information about children and divorce during mediation appropriate, they stressed the need to give the information in a non-directive way, without the mediator assuming expert status or control: [11]

> Having had a session on the effects of divorce on children, I got told a few things - I'm pretty sure the parents have a good idea. I wouldn't want to be in the position of lecturing. [But] yes, it [knowledge of the psychological effects of divorce on family members] is vital. (out-of-court conciliator)

Concerns about disputant autonomy even led one practitioner to suggest that mediators should not receive training in this subject:

> I think they [the disputants] have knowledge of their own. It is difficult to answer. I don't feel it is necessary because each family brings its own problems.

This mediator was concerned that mediators tackle each individual dispute as experienced by that particular family, that they not rely on research done on other families when approaching a particular family's dispute. The practitioner also commented that she thought it degrading to parents for a mediator to cite research to them about other children and other family's experiences with divorce.[12]

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11 The roles of the mediator with respect to expert control and child advocacy are discussed in greater detail in chapters 4 and 5.

12 Perhaps these concerns were part of the reason some family law practitioners failed to endorse the need for mediator education in this area.

The mediators' comments as a whole suggest the need for this topic to be addressed at both a procedural and substantive level. At the substantive level there would appear to be a need to make mediators aware of the limitations and contradictions of the research in the area; and of the vast range and variability of personal and family experiences which can arise upon family reorganization, even among families using the same child arrangements. Perhaps this would remove any inclination mediators have to channel families into adopting particular courses of action.[13] The mediators' comments also suggest that the dangers of uncritically exposing mediators to selected studies supporting a particular point of view - for example exposing mediators to the literature and research depicting the benefits of joint custody without exposing them to some of the literature and research indicating problems and the need for caution.[14] On a procedural level, the practising mediators suggest the need for beginning mediators to learn how to use this information in the mediation process to enhance rather than to limit the disputants' options.

Positive Connotation and Reframing

Before we explore the mediators' comments, a few words of explanation about the placement of this category are in order. While 'positive connotation' and 'reframing' are techniques and not areas of substantive mental-health knowledge, they have been included in this section to illustrate some of the problems that arise from the use of disciplinary jargon when attempts are made to separate the education needed to practice

13 See chapters 4 and 5.

14 For example, to expose them to: M. Brotsky et. al. (1988): 53; S. Clawar (1983): 27; A. D'Andrea (1983): 81; R. Emery (1988): 129-131; J. Folberg and M. Graham (1981): 100-103; A. Hetherington, M. Cox and R. Cox (1982): 233; H. Irving and M. Benjamin (1986): 79, (1987): 193; M. Isaacs, G. Leon, M. Kline (1987): 101; J. Wallerstein and J. Kelly (1980): 199 (a book which is commonly cited as illustrating the advantages of joint custody and continuing parental contact; but which shows only that children benefit from continuing contact with both parents if the conflict levels between the parents are low or not affecting the child) without also exposing them to, for example: N. Allen, (1984): 39; C. Bruch (1988): 106; A. Fineberg (1979): 417; H. Goudge (1985): 7-8; J. Hagan (1987); G. Howe, G. Bishop, et. al. (1984): 63; J. Johnston, M. Kline et. al. (1987); M. Kline, J. M. Tschann et. al. (1987); L. Kurdek and B. Berg (1983): 47; R. McKinnon and J. Wallerstein (1987): 39.) See also: Family and Conciliation Courts Review, Vol. 27, No.2 (1989) for research and arguments in favour of and against joint custody.

mediation from that needed to practice social work, therapy, or counselling.[15] In **Table 11-1** we learn that most of the practising mediators thought mastery of these techniques very important for the beginning mediator. As we examine the practitioners comments, however, we shall discover that this apparent agreement in fact concealed some strongly held differences of opinion. The practitioners endorsing this skill or technique were not all talking about the same thing. The problem is caused by the mediations' inaccurate adoption of jargon and terminology from other professions.[16] We first encountered this problem in chapter 6, when we discussed the use of the term 'therapeutic' and again in chapter 9, when we discussed the term 'networking'.

When the practitioners ranked 'reframing' and 'positive connotation',[17] most were thinking of the rephrasing of disputants' comments for purposes of clarification and/or in order to remove the emotive content likely to cause escalation of the disputants' conflict/dispute.[18] For example:

> Yes. You take what they are saying, in slightly different language but exactly what they are saying and you say, 'Is this what you are saying to me?' I use it all the time. (out-of-court conciliator)
>
> Yes that is important. ... That is an important skill - to know how much to feed back - not holding back on things but down playing the negative. (out-of-court conciliator)
>
> What is important, particularly after the mediator has seen each party separately, is to summarize what the mediator has heard each party say

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15 See footnotes 16 and 17.

16 I am guilty of this also. I picked up the term 'reframing' from the mediation literature and began to ask the practitioners questions about its educational importance before I fully appreciated the term's technical and therapeutic meaning. My error was fortuitous in some ways because it has allowed me to illustrate some of the problems arising from inaccurate use of terminology.

17 The term 'reframing' was used in the question. When asked for an explanation, I spoke of rephrasing the disputants' comments for the purposes of clarity or in order to stress the positive. This explanation was given because this was the way the term was being used by practitioners. The mediators identified two components of rephrasing: emphasizing the positive or placing each side of the dispute/conflict in a positive context (These are not exactly the same thing. We will return to this shortly); and rephrasing for purposes of clarification. When the practitioners identified the former, they sometimes used the term 'positive connotation', hence the inclusion of both terms in this section.

18 While not all of the practising mediators added comments when they ranked each subject, it was clear, from the comments of the 40 who added an explanation, and from the comments of the practitioners as a whole - about the place of therapy in mediation - that the vast majority of the practitioners were not thinking of 'reframing' or 'positive connotation' in the technical, therapeutic sense.

> and to say exactly what each party has said, but not with all the recriminations, all the emotional anger, hate and hostility. That would be counterproductive. But the mediator has to restate the issues as the parties see them so the issues stand clear - not to distort or to put then in a sentimental way and not to misrepresent what the parties have said. The issues have to be stated clearly but not with the destructive parts. (out-of-court conciliator)

Other practitioners were thinking about mediators rephrasing the contexts of the dispute to enable the disputants to look at it differently, or to correct faulty connections,[19] for example:

> [The mediator] help[s] one party to understand what the other has said - or to help them see what is being said in a new context. [For example] vis-a-vis the [interests of the] children, rather than the old context: the battle. (out-of-court conciliator)

The mediators had no problems with the less intrusive forms of this technique, for example, a mediator trying to shift the parents' discussions from custody and access to shared and separate parental obligations to the children.[20] Most, however, were not in favour of mediators assuming the role of expert and redefining a family's problems for them. For example, the majority did not approve of mediators redefining a family's inability to reach consensus over the future care of their children as a dysfunction in the family needing correction.[21]

Other practising mediators spoke of the importance of emphasizing the positive:

> That is a technique which is very useful. ... You pick up the positive. ... In our programme here we have 15 minutes individually with each parent. We summarize [what each parent has said] in feedback [to them in a joint session]. .. [when we do so] we would be looking to put in at least one positive thing. (out-of-court conciliator)

Some called this 'positive connotation'. Others used that term differently, to mean the reinterpretation of negative perceptions or interpretations of behaviours in positive

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19 See, for example C. Moore (1986): 176-181.

20 We discussed the importance of mediators learning to shift the focus of discussions, for example, from positions to interests, or from interests to values, or vice versa, when we discussed the need for mediators to have negotiation skills in chapter 11.

21 See also chapter 6.

terms.[22] For example:

> Essential. Positive Connotation. A good example is where, for example, the mother says, 'He is always coming around and pestering us'. We would reframe that by saying, 'Well, it's good he is so interested in his children. Lots of men just run off and don't show any interest'. Or we might say, 'We understand how you feel, but isn't it nice he is so interested'. She may come up with some scathing remark like, 'He is just trying to intimidate me!'[23] .. We often find mothers being overprotective and not wanting access on the basis that Dad doesn't look after them properly. Dads look on that negatively. But we can say, 'But she is concerned, .. perhaps there are ways she can help you'. [We can] put things in a different light. (in-court conciliator)

To complicate problems with terminology further, some practitioners spoke of 'mirroring' or 'reflecting':

> Essential. It is called reflection in our jargon. (out-of-court conciliator)

> Yes, we tend to use the term 'mirroring' - where you reflect back - when someone is saying something to you and you don't think they really mean what they are saying. You can mirror that back to them so they can check out that they are saying what they mean to be saying. (in-court conciliator)

The problems with terminology are understandable. The mediators varied in age and in the period during which they took their social-work and mental-health training. Consequently they had been trained in different schools of thought, each with its own terminology and focus. It is interesting to note the continuing use of terms learned in early professional training and the lack of common language. This is one of the clearer indications of the incomplete disciplinary transition from the practitioners' disciplines of origin to mediation. It is also indicative of the early state of mediation's professional development.

Reframing, positive connotation, mirroring and reflecting, have different shades of therapeutic meaning, but the majority of the practitioners meant the same thing. They were talking about the importance of mediators knowing how to rephrase

22 For other examples, see: H. Irving and M. Benjamin (1987): 87-93; M. Oded (ed.) (1984): 22, 72, 73.

23 This practitioner is pointing out the potential for escalation which can arise with the use of this technique. This suggests the technique should be used with caution and only when it appears the disputants' own perceptions will allow them to accept the reinterpretation.

disputants' comments, or the context of those comments, in order to help the disputants resolve their disputes and conflicts. They were talking about dispute resolution, not about therapy. In essence we can find the same tools being suggested in forms of dispute resolution unrelated to the social work or psychological disciplines.[24] The fact that the knowledge the majority of the practitioners were identifying was not exclusive to the social and psychological disciplines does not mean, however, that these (as well as other disciplines) have no contributions to make to the development of the mediator's communication and dispute resolution skills. It does mean, however, that the disciplines and schools of thought as a whole from which the knowledge or skills were derived are unimportant to mediation.[25]

While the practising mediators identified the importance of reframing and positive connotation to mediation, their comments also suggest the immateriality of certain aspects of the techniques. Reframing and positive connotation can be used as therapeutic tools having no direct connection to dispute resolution or conflict reduction. Therapists can use the techniques to alter the family's own definition of its own problems, or to change the family's perception of its own reality, in the hope of producing therapeutic change.[26] For example, I Goldenberg and H. Goldenberg (1985)[27] state that:

> Enactments are often useful for reframing purposes. In such instances the structural family therapist reframes a problem ... as a function of the family's structure.

Two of the practising mediators who we have classified as therapeutic expressed their own roles in similar terms, as follows:

> [The mediator's role is] to add from an objective point of view what is

24 See, for example: Fisher and Ury (1983): 129; P. Wehr (1979).

25 For discussion of the fallacy of attributing dispute resolution tools to the discipline from which they were derived, see chapters 5, 6, and 9. Refer also to the discussions about the importances of family interaction and family systems theory later in this chapter.

26 For example: I. Goldenberg and H. Goldenberg (1985): 184; J. Howard and G. Shepherd (1987): 86-100.

27 184.

> going on within the dynamics of the family that might be preventing them from reaching a decision. (out-of-court conciliator)

Thus a family's conflict over the children will be reinterpreted as a problem within the family needing correction. The focus will be on treatment of the perceived problem rather than resolving the particulars of the conflict. It is only at this stage that the reframing and positive connotation strategies fall within the exclusive domain of the social work and therapeutic disciplines. Very few of the practising mediators condoned the use of this type[28] of reframing in the mediation process.[29]

It is important to realize the importance to mediation of the 'rephrasing' skills that the majority of the practitioners identified in this section as the research literature confirms their contribution to mediation's success.[30] The practitioners' comments as a whole make it abundantly clear that if mediators are to understand each other, and if the education and training they need is to be isolated, it is essential first to abandon the terminology and jargon of other disciplines. In order to avoid confusion about the knowledge and skills needed by mediators, it would appear appropriate to drop the terms 'positive connotation', 'reframing', mirroring' and 'reflecting' from the mediation literature entirely and to focus instead on the specific skills and techniques needed.

Child Psychological Development[31]

As we see in **Table 11-1** the practising mediators (84.2%) stressed the importance of educating mediators in this area. The family lawyers failed to endorse this subject, perhaps because they, themselves, had little training in this area.[32] As we have already noted, a substantial minority appeared uneasy about their own professional competence

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28 The reframing examples in the text are from a family systems perspective. Psychologists and psychotherapists presumably might reframe differently, for example, in terms of inner psychological problems stemming from past experiences, and marriage guidance counsellors might reframe in terms of unresolved problems from the parents' marital relationship. Even so, the same arguments would apply.

29 Refer also to chapter 6.

30 J. Pearson and N. Thoennes (1985a): 461.

31 The psychological effects of divorce on family members and child psychology were given separate categories.

32 See chapter 9.

to handle child issues.[33] The lawyers also appeared to be concentrating on financial and property issues when they made their educational recommendations. Even so, the majority of lawyers considered mediator education in children's psychological development at least helpful. The mediation literature supports the practising mediators' views of the importance of this subject.[34] In addition researchers have found that parents want those helping them with their legal disputes over children to have training in this area.[35]

It is interesting to note that the practising mediators did not think it nearly as important for mediators to acquire knowledge of children's behavioural problems. It will become apparent that this was because most did not think it part of the mediator's role to evaluate, assess, or treat these problems and because knowledge of normal human behaviour was considered much more important than knowledge of abnormal behaviour.

Most of the practising mediators appeared to be reasonably well educated in children's psychological development.[36] In chapter 2 we saw that the majority had moderate to high levels of formal education, and or had completed moderate to large amounts of reading in this area. We would not expect the practitioners, therefore, to understate the importance of mediators acquiring education in this area. With these thoughts in mind, we turn to the mediators' comments.

Most thought that beginning mediators should learn the effects of age and maturity on children's responses and adjustments to divorce and family reorganization; and about their age-related needs and psychological responses to various types of

33 L. Neilson (1990).

34 See, for example: H. Andrup (1983): 48; M. Baker-Jackson, K. Bergman et. al. (1985): 71; S. Brown (1985): 49; G. Chase (1983): 85-86; C. Cramer and R. Schoeneman (1985): 37; F. Gibbons and D. Elliott (1997): 14; S. Grebe (1988b): 16; J. Haynes (1984a): 502; J. Lemmon (1985b): 19; A. Milne (1985b): 79; Newcastle Report (1988): 55; L. Parkinson (1980): 139, (1986a): 113; J. Saposnek (1983): 37. But see: G. Davis and M. Roberts (1988): 81. See also: E. Koopman (1985a): concerning the high rating given to this area by mediator educators.

35 M. Murch, M. Borkowski et. al. (1987).

36 'Child psychological development' is, however, a broad topic. It is entirely conceivable that a person could have considerable education in this area without being well versed in the specific matters the practitioners identified as important to mediation.

visiting arrangements:

> Yes, a background knowledge. The sort of thing I am thinking about is when a mother, for instance, will tell you that the child had a horrible time visiting Dad. If you know, you can explain that the child might possibly be doing that [behaving that way] because she doesn't want to lose mother's affection - because father has pushed off - that she is trying to please the mother. Father is often sitting open mouthed [when the mediator] explain[s] the child isn't deliberately lying. And the father is probably going to say that he has been told by the child that the mother does this or that. .. It is all to do with the fact they do play one off against the other. (out-of-court conciliator)
>
> Yes, you must have a bit. [To understand, for example, that] a one-and-one-half-year-old isn't going to be comfortable being away from mother for the night if the child hasn't seen father for a month. So yes. At least as far as it relates to custody and access. (out-of-court conciliator)
>
> It helps very much. Being aware of children's needs, and our own needs, and our stages of development, and about regression. Yes indeed, to know about that. When [the mediator is told that] a child's development or behaviour regresses, you can say, 'Of course, because a, b, or c. This is a healthy response. Don't worry'.

The practising mediators suggested the importance of this subject, even for mediators not directly including children in the mediation process - in order to enable the mediator to properly interpret the comments of the disputing parents. Mediators who include children need an understanding of this subject to understand children's comments and behaviours and, as we shall see, to develop appropriate techniques to use when interviewing children.[37]

The level of education the mediators identified did not, however, approach that needed by a child psychologist, counsellor, or therapist:

> [Mediators need] some aspects [of knowledge of child psychological development]. People who have had their own families probably have enough. It is more important to know what happens to people in the divorce process - [about the] emotional states. (out-of-court conciliator)
>
> That's intrusive. I don't think the couple have come to have their child psychoanalyzed and for you to put your ideas in when you are totally untrained in it! A little knowledge is a dangerous thing. There are experts to deal with it. It might even be negative. I do feel you should go to the experts and that if you want child psychology, you should go to a child psychologist. I think the conciliator who has training has a fair idea about

37 These will be discussed in the next section.

> children's stages of development - .. - of their needs. That is probably all they need. (out-of-court conciliator)
>
> You could have a course for mediators so they know what is available for children who are severely affected, but not to practice it. [For that you would] need to be highly skilled. (out-of-court conciliator)
>
> Again, I don't see this course turning someone into a psychotherapist or psychologist. They [the mediators] might by chance be those things. Some of the concepts of child psychological development are essential so that when they [the mediators] look at the effects of conflict within the home, they will understand some of the ways in which a child might respond to that. (consultant to a mediation/conciliation service)

We find the practitioners emphasizing general, rather than technical specific knowledge. We shall encounter the same trend when we discuss the mediators' comments about the need for beginning mediators to acquire legal and financial knowledge in chapter 13. While the mediators stressed the importance of knowledge of child development, they limited the knowledge recommended to that specifically linked to the divorce or to the dispute-resolution process.

In keeping with the practising mediators' endorsement of the importance of disputant autonomy,[38] however, they warned that mediators should not use their knowledge of child development to assume expert control or to direct the disputants:

> It [the need for mediators to have child development knowledge] is controversial. I would have to say essential - so you can understand, when they are expressing how their child is acting out - to be able to put that in context. So it is essential, but it can be quite dangerous if used wrongly. I have fears that people will then say to parents: 'This is what Johnny shouldn't be doing at this age' or 'should be doing at that age'. If it is used in that way, it is quite a bad thing but if it is used just as a backup - when parents say, 'Why do you think he might be acting in this way?', then it is quite useful to be able to put forward some theories. Essential. [*But important to have a section on how not to impose?*] That is right. Then it is dangerous. (in-court conciliator)
>
> One [of the most difficult things about mediation] is not going too far. Because if you have a psychoanalytic background - I'm not a psychotherapist - but in order to assess the emotional aspects, you've got to understand how that person works. [But] it is not appropriate to use it. It is a difficult balance. It is a tightrope. You've got to keep within what they've come for. (out-of-court mediator)

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38 See chapter 5 concerning the role of the mediator with respect to disputant power and the protection of children.

Again, the practising mediators suggest that giving professional advice or engaging in treatment (as opposed to giving general information about children's normal responses to family reorganization) is outside of the role of the mediator.[39] Instead, the practitioners suggest that families with children whose behaviours fall outside the range of normal, should be referred to other professionals for assistance with those problems. This presumes that mediators will have enough knowledge of the normal reactions of children to family reorganization to be able to recognize when to solicit outside professional assistance, and also that there will be inter-professional co-operation and a willingness of mediators to refer their clients to others.[40]

In chapter 9 we discovered that the practising mediators were critical of what they perceived to be family lawyers' lack of training in the psychological development of children. We wondered at the time whether or not the criticism stemmed from the mediators' own professional self interests, given the roles of the mediator as the practitioners identified them in chapters 4 and 5. We see now, however, that there is considerable support for the practising mediators' views. We also find the mediators limiting the parameters of the knowledge advocated to that required to fulfill a mediator's role.

Communication With Children

In **Table 11-1** we learn that the practising mediators gave relatively high priority to teaching mediators how to communicate with children.[41] In fact, if we omit the answers of all those who did not consider this important because they did not include children, we find that 93.2% ranked this knowledge as either essential (74.0%) or very

39 See also chapters 4, 5, 7, 9, and 13.

40 For a discussion of mediators' referrals to lawyers and financial advisors, see chapter 13.

41 Initially this subject was not offered separately. (The need for practitioners to have communication skills has already been discussed in chapter 11) During the course of the interviews, however, a large number of practising mediators specifically mentioned this topic. Consequently the subject was added. Most of those who were not offered the subject for discussion or who did not comment on the importance of mediator training in this area did not regularly include children in mediation. (See chapter 3, 5 and Appendix A-1)

helpful (19.2%). Ten of the practising mediators commented without solicitation that they desired further training in this area. Many of the briefs submitted to the University of Newcastle-Upon-Tyne, in furtherance of their study of mediation services in England and Wales, suggested the need for mediator education in this area.[42] If mediators are to include children in mediation, (and this is a controversial issue[43]) it appears, if we accept the practitioners' rankings, that they should first learn how to best interview and communicate with them. Presumably mediators who include children will also need to have a good understanding of the psychological effects of divorce on children and of those aspects of child development discussed earlier.

Few of the practising mediators (only 15) expanded their answers when they ranked this subject so that I am unable to state with certainty the depth or type of knowledge the majority were advocating. Those who did comment said that mediators need to be current in children's interests and concerns:

> I think it is very important, certainly. Children of today are very different, I find. It is important to keep in touch with the latest series on tv, on space and all this. Because sometimes children tell me about the toys - all these Darth Vaders and Star Wars and all that. So I can talk and communicate with them. .. [I say] 'I'm Mrs. T' and they say, 'Any relation to ET[44] lady?' I say, 'No, not yet, but to Mr. T.' It is all part of the opening gambit. (in-court conciliator);

and that they need to know how to use age-appropriate interviewing techniques:

> I found working with a colleague, using a conciliatory method in writing a court-welfare report, that I was all right with the children over 10 or 12, but didn't have the skills my colleague had in dealing with the younger children. You've got to know how to get them talking through playing. (out-of-court conciliator)

Others commented, however, that they thought this ability innate or best acquired through experience, rather than academically:

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42 Newcastle Report (1988): 3. See also: A. James (1988a): 79; A. James and K. Wilson (1986); J. Neal (1983): 1; L. Parkinson (1987a); A. Robinson (1987): 6.

43 I have not fully aired the controversy in this work. For a limited discussion, see chapters 3 and 5.

44 Children know 'ET' from television or movies as a friendly space being. When the speaker refers to 'Mr. T', we can't be sure whether the reference is only to her husband or also to an American television character known by the same name.

> I think that is marginally helpful. I think if someone is a good mediator, that somewhere along the line that should come into part of the skills - unless it is natural. I don't know whether or not, apart from your natural ability to deal with children, there is any adequate training. I have difficulty with this one. I think of it as useful but I can't think of it as essential or even very helpful. Put it lower down. (out-of-court mediator)
>
> Assuming there is a method which can be learned. I'm not sure that is right. Really it depends on settings, reasons for the meeting, and personality, age perceptions and the maturity of the child. [It is] difficult to learn. We all know the theory but you can't really learn it without actually doing it. Perhaps it should be available if conciliators felt it necessary. A background, yes. Or if [the conciliator was] having difficulty, perhaps a course to examine whether they should be doing conciliation at all. (in-court conciliator)

As we saw in chapter 6, there may be some truth in the view that personal characteristics and inherent native ability are more important than learned techniques. There are research findings to the effect that people prefer practical social and mental-health workers to those applying theoretical methods.[45]

Non Verbal Communication Or Body Language

In **Table 11-1** we learn that the family lawyers gave this subject far lower priority than did the mediation practitioners. Perhaps the lawyers were not exposed to this topic in their own education and training and were predisposed, therefore, to discount its importance. Or perhaps the lawyers considered the subject unimportant and a matter of common sense. Alternatively, perhaps the family lawyers had not had as much experience as the mediators in conducting group meetings involving high levels of inter-personal emotion and conflict. Even so, the majority, or 56.1% of the lawyers, considered it at least helpful for the beginning mediator to acquire knowledge in this area. 92.9% of the practising mediators, however, rated this area at least helpful, including the 79.6% who rated it 'very helpful' or 'essential'. Other mediators have also stressed the importance of this subject to mediators.[46]

Generally the practising mediators thought this subject should be included in

45 See chapter 6.

46 For example: M. Baker-Jackson, K. Bergman, et. al. (1985): 71; R. Fisher and S. Brown (1988): 49; H. Hall (1990): 77; J. Haynes (1984a): 502; A. Salius and S. Maruzo: 176-7.

the mediator's training, but that it should be integrated into the mediator's conflict resolution training rather than taught as a separate, distinct subject. The practitioners wanted beginning mediators to be taught how to interpret the levels of conflict, hostility and anger occurring in the room; to be alert to conflicts not being addressed verbally; and to be able to sense matters causing the disputants discomfort. For example:

> Only to a certain extent. You will see the interaction between the parties when they are sitting in the conciliation room. .. It is a combination of body language and the spoken. I find it useful to listen to what is not being said or not being verbalized. (in-court conciliator)

> It is important. I think that is why I gave up mediation. I found it increasingly difficult to interpret [what was going on in the room] by sound alone. I became less and less able as my sight became poorer and poorer. It does detract from your ability to detect what is going on. (out-of-court, retired conciliator)

A number of the practitioners endorsing the need for mediators to acquire an understanding of this area also suggested, however, that the abilities to interpret non-verbal communication and body language are personal attributes or something one learns in one's own life experience rather than educational concerns:

> Yes, that is essential. Because what that means to me is to be perceptive and sensitive to people in ordinary human terms. And if you are not that, then you cannot do this job. (out-of-court conciliator)

> I would think it interesting and helpful - useful. But, again, I think you pick that up in your own life. Helpful. (in-court conciliator)

A few cautioned that undue reliance on, or attempts to professionally interpret, non-verbal communication could complicate mediation and lead to problems:

> We, both of us, are that way oriented. But we've learned in mediation that that is not what it is about. It complicates things. You have to learn not to use it. (one of two out-of-court conciliators)

> It is hard to separate. You ought to know, yes. Though if conciliation is about problem solving, then it may not be as important. Unless it is grossly obvious we tend not to think about it. You ought to be looking at things that are harder [and more concrete]. Helpful, not essential. (in-court conciliator)

The essence of what the mediators were saying was that mediators need to be made aware of the meanings and implications of some of the more common types of

disputant behaviour during mediation sessions, and to understand the importance of being observant and sensitive. The scope of knowledge identified by the majority fell far short of that needed to make a therapeutic assessment.

We should note that this subject can become complicated if mediators are being taught to work with families from a variety of social and ethnic cultures. Non-verbal communications such as head nodding, smiling, and clenching of the hands have different meanings to different peoples. Perhaps the warning of the practitioners that mediators should not be making professional assessments is particularly important in those cases. We shall discuss the importance of ethnic and cultural knowledge shortly.

Mediator Assessment Of The Potential For Reconciliation Or Ability To Detect Whether Or Not The Disputants' Marriage Is Over [47]

The first thing we notice about the practising mediators' ranking of this subject is that it was not considered as important to the mediator as understanding the psychological effects of divorce and family reorganization. There were two reasons for this. The first was that, as we shall see, the mediators considered the topic to be procedural, not substantive, and so had difficulty ranking its educational value. The other was that the wording of the question suggested expert assessment rather than disputant control. In keeping with the pro-disputant-autonomy outlook of the mediators we discussed in chapters 4, 5, and 6 this caused the practitioners to protest:

> No. Within the constraints of our focus, no. It would not be appropriate for the mediator to make those sorts of assessments. You would need an enormous amount of knowledge about the parties and even if there was some sort of list of criteria available, and I don't think there is, I don't see how the mediator's views have a bearing. It is the parties' views which are important. (out-of-court conciliator)

> I'm not sure how one would do that. It doesn't matter what I think. It matters what they think. ... My opinion isn't important. Our opinion is not relevant. It is the couple's opinion which is important. (out-of-court conciliator)

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47 This subject was included to elicit practitioner views about the boundaries of mediation and reconciliation counselling.

The majority of those practising mediators who said that they thought this subject important in the mediator's training were considering procedure, not substantive knowledge. They stressed the importance of including a process to explore this issue: [48]

> The ability to help the parents recognize whether or not their marriage is over. But I might have a different perception of it and I don't think it is my imposed perception that is important. I think I would need to recognize if there was doubt and have techniques to enable people to discover [for themselves] where they are really at. (out-of-court conciliator)

> Yes, that is important. If in the conciliation process you pick up hints then you refer them to Marriage Guidance perhaps - rather than take over the session and do marriage guidance there and then. You need a fairly tuned sense of that. (out-of-court conciliator)

Perhaps, before continuing our discussions of the relative importance of mediators receiving training in this area, it would be wise to clarify the practising mediators' perceptions of the boundaries between mediation and reconciliation counselling.[49] While many of Greater London's mediators initiated preliminary discussions with the disputants about the finality of their decision to divorce,[50] if it became clear that the disputants were uncertain that their marriage was in fact over, the mediators said that they discontinued mediation and, instead, suggested a referral to marriage counselling or family therapy. One mediator in Greater London described the relationship of mediation and reconciliation counselling as follows:

> I think you have to have a session on that [the decision to divorce], to prevent the conciliator getting into a muddle when they have people with unresolved issues with respect to the marriage, which need to be resolved before you can conciliate. You have to recognize it and send people either backwards to Marriage Guidance or else recognize one party is out of kilter with the other and may need some individual counselling on their own, in which case there are places to send them. You need to recognize when the job is impossible because of the different stages [of emotional divorce].

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48 See also, for example: J. Haynes (1981): 60-61; D. Saposnek (1983a): 74.

49 Much of the following discussion about the boundaries of mediation and reconciliation counselling first appeared in: L. Neilson (1990). The mediation practitioners were clearer about mediation's boundaries with reconciliation counselling than were Greater London's family lawyers. While the majority of the lawyers were able to correctly identify the goals of mediation, 21.9% (23) confused mediation with reconciliation counselling, or assumed that the two were part of the same process.

50 See also, for example L. Parkinson (1986a): 72-3.

Another had this to say:

> We have to assume the marriage is over, although in almost all cases the marriage isn't over for one of them. In very few families that come to us have both agreed that it is over. One is [usually] clinging to a faint hope and sometimes that is the purpose of coming to mediation. One has to get it out of the way at the beginning of the session ... [You have to] make it clear at the beginning of the session that this is not reconciliation - that we are assuming the marriage is over. Again, if there is a chance that the marriage is not over it is important that they get referred elsewhere. It is important that we don't try to do marriage counselling - because if you start doing that then I think people would get awfully confused about what kind of service we are really providing.

The mediators viewed acceptance of the decision to divorce[51] as a prerequisite to mediation[52] and complained that mediation was often inappropriate for those unable to accept the inevitability of their own divorce:

> That is the first thing we do: is find out whether they have actually decided to separate ... [We] explore the decision to separate as a preliminary stage and explore how emotionally separate they feel because I don't think you can do conciliation until you've got the decision to separate.
>
> [The following quotation is taken from a discussion with two conciliators. A change in conciliator is identified by a change in number.] #1: That is what we are dealing with anyway, is the ending of the marriage and the imbalance that creates when one party wants to go on and the other doesn't. #2: That is my definition of conciliation: unmarrying people. #1: That is why conciliation often fails: if the parties are not yet at the stage where one #2: is still emotionally entrenched in the old relationship. Then it isn't in their best interest to agree.
>
> If I look back at clients over the years, it is really the person who finds it really difficult to let go of the marriage [that is the most difficult] ... It takes all sorts of forms and is the problem which lies behind almost all access problems - where one partner has not accepted. It comes again when one partner remarries: ... 'I don't want him to see that woman!' If you listen carefully it all boils down to hate being the other side of love. They can't accept that love is not there. It moves to revenge, bitterness and that for me is the most difficult problem we face day after day ... [It is] the root cause of 90% of our problems.

Mediators in the United States have reached similar conclusions.[53] Very few of Greater London's mediators offered their clients reconciliation counselling as part of the

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51 Or to cease living together in a 'spousal' relationship.

52 See also: L. Parkinson (1985b): 241; M. Wilkinson (1981).

53 M. Little, N. Thoennes, J. Pearson and R. Appleford (1985): 10.

mediation process.[54] Thus, while the majority thought it important to teach beginning mediators of the importance of exploring the potential for reconciliation, they did not think it important for mediators to acquire substantive knowledge in the area of reconciliation counselling.

Other mediators, who endorsed the need for mediator training in this area, spoke of the importance of teaching new mediators the importance of determining the disputants' respective stages in their emotional divorce process:

> It is fairly essential because that will determine to a huge extent each person's ability to operate on an adult level, which they have to be able to do if they are going to enter into the negotiation process. (in-court conciliator)

> You mean whether they are able to negotiate or whether they are still too much into the background. Essential. (in-court conciliator)

The mediator needs this information in order to appraise each disputants' readiness and ability to negotiate and to assess differences in negotiating power.[55] From this appraisal the mediator can gauge how best to balance the disputants' respective abilities to negotiate. For example, one mediator commented:

> [You need] the skills of a negotiator which is to recognize when people are at different stages of the divorce process. [For example] one is quite relieved and the other is in a state of shock and disbelief. He may need more encouragement and support. Then you must acknowledge that [make explicit what you are doing] so she [the one who had made the decision and is relieved] doesn't feel we are trampling on her. (out-of-court conciliator)

This practitioner's response illustrates an understanding of the dispute-resolution process. Curiously, few of the practitioners' comments revealed expertise in this area. During the course of the interviews, it began to appear that, while the practitioners were reasonably well versed in social work and counselling skills, and while many were slowly adapting their social work and counselling skills to accommodate dispute resolution, many, and perhaps even the majority, lacked breadth in basic

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54 See Appendix A-1.

55 I.e. J. Haynes (1981): 61-2.

dispute-resolution knowledge and techniques.[56]

Upon review of this section as a whole we find that the practising mediators did not think it necessary for new mediators to learn how to do reconciliation counselling or marital therapy. They did not consider repairing marital relationships or interactions part of their role. They did think it important, however, for mediators to understand the emotional components of the divorce process, and to include, in mediation, a preliminary procedure to enable the disputants to consider the possibility of their own reconciliation and to allow mediators to gain information about the state of each disputants' emotional divorce.

Family Interaction And Family Therapy

In **Table 11-1** we learn that this subject was given much higher priority than family systems theory. 73% of the practising mediators ranked this subject 'essential' or 'very helpful', while only 43.1% similarly ranked the importance of family systems theory. As we move through the practitioners' comments, we shall discover that there were basically three reasons for this. First, the mediators did not consider theories terribly important. In **Table 11-1** we see that all subjects connected to the word 'theory' received low rankings. It appeared that many of the practitioners preferred experiential to academic or theoretical knowledge:

> No. [Family systems theory] is a red herring. Not relevant. I don't like the word theory. Because it isn't relevant to practice. The word 'theory' to me conjures up the picture of someone without experience of the situation deciding what should be done. (out-of-court conciliator)

> Do you know about the 'id'? Well Flo Hollis was in [vogue with social workers] and then - we go through phases - Pincus and Minahan[57]. I think they will all be dying a death shortly. And then there was ...[58] You

56 See also chapter 11 and chapter 2. This was an impression only, based on the practitioners' comments and the education and training they reported in chapter 2. A full assessment of the accuracy of this impression would have required observations of each practitioner handling a numerous mediations cases.

57 I.e.: F. Hollis (1964); A. Pincus and A. Minahan (1973). These are authors of texts on social work methodology.

58 I am unable to make out the name of the theorist cited.

> get your book and you get your era. Well, Flo Harris was the one in my day. .. I could quote chapters and my tutors became quite concerned that I was becoming too academically minded. And it was pretty horrendous. When I got out there was no book to help me. ... I [needed to use] my gut reaction along with my skills. (in-court conciliator)
>
> I'm wary of that [family systems theory], because I've read some academic books on that and I think it is utter tripe and they betray in the first few pages their lack of experience [in practice]. ... That sort of thing should be thrown out. (in-court conciliator)
>
> [Family systems theory is] not essential - not in mediation. It might be helpful in so far as an understanding that divorce affects the wider family. But how much of that is common sense. [To know to ask] what do their parents' think? Can they [their parents] help? How much have [their parents] been involved? You need to [understand the importance of] learn[ing] what are the support systems for these two parents, rather than [having] an intricate knowledge of family systems. .. You don't need to do a family therapy course for that. (in-court conciliator)

The second was that many thought it more helpful to expose mediators to a multitude of theories and methods.[59] These practitioners were concerned that mediators not adopt any one particular model or theory about families for exclusive use:

> #1: In one sense [family systems theory] is essential. You need some idea how families operate. .. But then if you go further than that and start talking about family therapy and systemic ways of working then I would say, it is certainly not essential. #2: My answer is you need more than one theoretical body of theory with skills. You need a generic basis of different theories of family interaction and work so you can move flexibly between different ideas and methods. #1: Some family therapy techniques can be very helpful and some not. I am totally opposed to one rigid model with the variety of situations we get. (two in-court conciliators)
>
> That is just another theory about how the family works. I don't think that, in itself, is a prerequisite. It is just part of the theoretical knowledge that some people have put forward. I don't think that is essential. (out-of-court conciliator)
>
> No, you don't *have* to have it. Helpful. There are certain techniques and ideas which are useful - eclectically. No more than any other area. One takes anything that seems effective. But to say we take a family systems perspective is playing into the province of neutralizing one agency as opposed to another and more energy goes into that than into finding the common ground. (out-of-court conciliator)
>
> I am against any rigid 'do it this way, do it that way'. ... I will want to learn as many techniques as possible but don't ask me to apply only one. ... I've done a family therapy course, a psychoanalytically based course on

59 See also: H. Johnson (1986): 299.

> child care, courses on marital interaction. .. I use bits from each. I think systemic theory can be extremely useful and the psychoanalytic. .. It keeps your mind open. To adopt one model is nice for the worker. .. [But] People aren't made like that. It is OK for making tables, but not for this. I feel strongly about that. (in-court conciliator)
>
> I'd put that a different way: not family systems theory, but what can happen in a family and how members can affect each other. [In order to] get away from a particular theoretical perspective. ... Family therapy experience .. can help in the mediation process, but again if, during the mediation process, you seek to take that on board, you've got to be very clear about what you are trying to do. Knowledge of a particular theoretical perspective is fine, but leave it there and lets get back to here and now and what we are actually talking about. (out-of-court conciliator)

It would appear, from the practitioners' comments, that educators should familiarize mediators with a whole range of theories about family and human behaviour and interaction, that they should not concentrate on any one model. If mediators were being trained to include family therapy in mediation, this would involve a lengthy course indeed. If, however, the purpose of the mediator's exposure to these theories is only to enable the mediator to take and remove dispute/conflict resolution tools from these various approaches and to enable mediators to make appropriate referrals, as the majority of the practitioners have suggested,[60] then an overview of the various theoretical perspectives and methods would appear to suffice.

The third reason was that many of the practitioners continued to emphasize disputant autonomy. They did not think it appropriate for the mediator to assume the expert control, status, or the power needed for the professional assessments required to apply the mental-health theories.[61] Thus we find in **Table 11-1** that none of the specific schools of thought or professional models of practice within the mental-health domain (i.e., family systems theory, psychotherapy, behavioural modification) received high rankings.

We have already discussed the practising mediators' concerns about therapy in mediation, and about mediators assuming professional or expert power in mediation in

60 See chapters 4 and 6.

61 See also chapter 6.

some detail in chapters 5 and 6. Those concerns were more apt to surface when the practitioners discussed the importance of mediators learning family systems theory, than when they discussed the importance of mediators understanding and recognizing family interaction and role problems. For example:

> #1: If you are talking about knowing how the family works and interaction, then you are talking about different conceptual frameworks and how to work with intact families and separating families. #2: ... But if you are talking about trying to impose a strict family therapy model - of whatever kind - onto these families .. then I think you are in cuckoo land and it can be quite dangerous. What is frightening is that it is too simple and people like it because it gives them authority. ... We are talking about unresolvable tensions and conflicts. .. It makes it so much harder than the blinding light and the evangelical vision, (two in-court conciliators)

In **Table 11-1** we find that all treatment categories received low ratings.[62]

The practitioners argued:

> I am sorry to be pedantic about this, but it sounds - clients do come expecting you to wave the magic wand and to put it right for them, but I can't do that. It is up to them - with my help. I'm not there to impose anything on anybody. I am there to help them see that a different approach as far as the children [are concerned] would be helpful. I am not a family therapist. A family therapist is much more highly trained than I am. That is a completely different area. Conciliation is much more on the surface, much less into people's behavioural problems. (out-of-court conciliator)

> I don't think we are involved in role behaviour. All this talk implies the mediator will be making assessments of role behaviour and the family's dynamics. The very posing of the question presumes an approach I don't support at all - that the mediator must make psychodynamic assessments, whatever - and then engage in some sort of activity which involves changing the parties' perceptions. In fact mediation is just the opposite. It is the parties' views that are important, not the mediators'. It is their views, their issues, their dispute. (out-of-court conciliator)

The perceived inappropriateness of therapy or therapeutic processes in mediation was the reason many practitioners did not think new mediators needed to be taught substantive therapeutic knowledge from any of the categories suggested:

> Understanding is one thing. What they then do about it is another. And I think we have to be careful. We are not trying to be family therapists.

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62 For a breakdown and discussion of the points of view of the practitioners about the place of therapy or therapeutic processes in mediation, see chapter 6.

> That is why I am wary about how much they know, because the more they know, the more they will want to do the next bit, which is therapy. [They must keep] all this information in the back of their heads. (in-court conciliator)

There were certain things the practising mediators did want beginning mediators to understand, however, some of them implicit in the mediators' comments we have already discussed.[63] The practitioners did want mediators to know enough about family therapies in general to be able to make appropriate referrals:

> I think we are seeing, apart from counselling, because of its [mediation's] peculiar nature, [that] these far more clinical skills are not appropriate. ... I think we need to know if it [dysfunctional family interaction] needs correction but we don't need to know how to correct. We'll send them off to an expert. (out-of-court conciliator)

> It is useful for them to know the different ways in which therapy is done and the kind of ways people observe couples and families, so they can get an inkling of what is likely to happen if they refer them [their clients] to a certain sort of place. But they are not going to do it themselves. (consultant to a conciliation/mediation service)

They also wanted mediators to learn how to conduct and balance family meetings. In fact 6 practitioners, without solicitation, choose to add this to the suggested list of subjects.[64] The mediators also suggested that beginning mediators should be given some understanding of family structures and, in particular, the variety of balances and spheres of power existing in families, and the variety of inner-family negotiation styles. The practitioners also wanted new mediators to gain an understanding of the importance of family roles, for example, an understanding that each parent can fulfill a different role for the child:

> #1: Yes, they have to be able to evaluate it [family role behaviour]. #2: Absolutely. Taking an example from a report where - it was not conciliation but [conciliators] need the same knowledge. It was a custody dispute. There was no difference in the parents [ability to care for the children] at all. I ended up concluding [that] the only difference was in their roles. Dad fulfilled the child's play needs and the security and comfort needs came from the Mom. (in-court conciliator)

Some suggested that new mediators learn techniques to help parents separate their

63 There will be some overlap with family systems theory here because that theory is about family interactions, relationships, and roles.

64 See Appendix A-5.

spousal from their parental roles. They hoped that this would enable the parents to be active in the children's upbringing without old feelings and animosities intervening. In chapter 4 we learned that 11 practitioners identified the separation of parental from spousal roles as one of the goals of the mediation process. Other practitioners wanted mediators to be taught the importance of including or considering (actually or figuratively) all family members or family relationships likely to affect or be affected by the family's eventual parenting plan.[65] For example:

> [An understanding of family interaction is] Essential - things like alliances between family members. Yes, because they can strengthen any agreement. It is those who are waiting outside who can either make an agreement or destroy it. So that is important. (out-of-court conciliator)

> As I was taught: don't forget Grannie. They are the people you don't usually see. You may get a feeling in conversation that the person who is actually doing the speaking is miles away. You need a realization that there are others who contribute to the family dynamics. (in-court conciliator)

Several practitioners mentioned the importance of teaching new mediators to identify families with so many problems that mediation was not appropriate for them:

> #1: [An ability to recognize dysfunctional family interaction is] Essential. #2: For what purpose? #1: To know what is going on. #2: But you aren't going to communicate that to anyone so why do you need to ? #1: You have to be able to evaluate what is going on to assess whether conciliation has any chance of success and to see whether it is being sabotaged by the family's interaction. (two in-court conciliators)

> People often come at the wrong time, when they are not able to use the process, and the skill then is to say: this is a waste of time, and not carry on. If you do carry on, you are stirring the pot and making things more difficult. [For example] if you have someone who has just come to the meeting to say, 'no' and to put down the other person, then the quicker you stop that process, the better. There is a danger in carrying on too long. ... OK, people do need to shout, put down the other - to get it out of their system - but, if at the end of [a period of time] it still isn't moving, then I think you have to say it really isn't going to work. (in-court conciliator)

And one practitioner mentioned the need for new mediators to gain an understanding of the difficulties inherent in blending families:

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65 The term 'parenting plan' comes from the writings of E. Koopman.

> Within certain limits. I think, in looking for some kind of agreement, that this can cause stress on the family. For example: the father might want the children on weekends to be totally integrated with his new family and he might have two new children by his new wife. The children might want to spend time with him alone. Maybe they need separate time. Maybe you could point out the social consequences of any agreement. We should help them look at that. (out-of-court conciliator)

Most of the education proposed by the mediators in this section relates to dispute resolution. The subjects were not therapeutic. This should not be surprising because, as we saw in chapter 6, very few of the practitioners were in favour of incorporating therapy in mediation. With the exception of the need for mediators to have some understanding of families and parental, spousal, and child roles within them; and the need for mediators to understand the difficulties faced by multi-polar or blended families; all of the knowledge proposed in this section may be acquired outside of the social-work or mental-health disciplines. We might rephrase the knowledge as follows: mediators need to know how to conduct joint interviews and meetings; mediators need to understand the importance of assessing and addressing the negotiating power of the disputants; mediators need to understand negotiation strategies; mediators need to know how and when to balance disputant negotiating power; mediators need to know how and when to unlink issues; mediators need learn to fully explore conflicts; mediators need to understand the importance of considering all relationships likely to have an impact on the success or failure of agreements; and mediators need to understand the importance of accommodating the views of all disputants during the dispute resolution process. This knowledge is not exclusive to the mental-health disciplines. It is possible, but not essential, to extrapolate this type of knowledge from the social-work and mental-health fields. The same knowledge can be gained elsewhere. The practitioners' recommendations also suggest the need for new mediators to concentrate on acquiring procedural tools rather than substantive knowledge. The knowledge the practitioners identified tended to relate to expertise in the dispute resolution process rather than to the application of substantive knowledge of families.

Ethnic Or Cultural Knowledge

In **Table 11-1** we find that the need for mediators to acquire ethnic and cultural knowledge was also given a relatively high rating.[66] Seventy two percent of the practitioners considered ethnic or cultural knowledge either very helpful or essential. During the course of the interviews nineteen of the practitioners mentioned that they wished that they had more training in this area.[67] While the lawyers did not rank the subject as highly as did the mediation practitioners, 73.9% considered this subject at least helpful to the mediator. Even the registrars who conducted in-court mediation in Greater London during 1987 spoke of the importance of this subject and of their own desire to have more training in this area. There was a virtual consensus about the importance of this subject.

The mediators who did not think this area important were practising mediation in services that served a cohesive clientele or they were concerned about mediators acquiring pre-determined views about cultural norms and values. The latter group of mediators thought it better to teach mediators methods to elicit ethnic and cultural information, norms, and values, from the disputants on an individual, personal basis. The majority of the mediators, however, thought that beginning mediators should receive some exposure to this subject in their preliminary mediation training. They offered a number of suggestions for inclusion.

We shall begin our examination of the mediators' suggestions with those offered most frequently.[68] Twenty-two of the practising mediators mentioned the need for beginning mediators to learn about the different the family structures which exist in different cultures to enable mediators to identify those with the responsibility and power in families to make decisions concerning the children:

> It is important. It may not be enough, even if you have a good knowledge, for them to feel you understand. I don't mean that you can't

66 See also: L. Parkinson (1987a): 149; I. W. Zartman and M. Berman (1982): 226-8.

67 See Appendix A-5 for a list of subjects in which the practitioners sought more training.

68 All of the suggestions were offered spontaneously.

> work with them if you are not the right colour or the right religion. I think you can. But it is important. You've got to know, for example, that in that group the power is actually in the mother-in-law, the father's mother, and it is no good looking anywhere else. It is no good working with the couple unless you have all the power bases there. (out-of-court conciliator)
>
> #1,2,3: Vital. #1: which I discovered to my cost when I first came here. I had Asians and they agreed to everything here and one hour later the phone was ringing and they were all disagreeing because they had gone home to their families who said, 'No way!'. #2: And things like in some cultures the children are brought up by the paternal parents anyway. #3: And in the Indian subcontinent it is an anathema for them to meet after breakup and so therefore conciliation is really out the window. The parents don't like to come face to face. [It involves] a massive loss of face.[69] (three in-court conciliators)
>
> Absolutely. You couldn't do without that in ... You walk into an Asian family and treat it as you would an English family and you are going to run into difficulties. Very dangerous. Absolutely essential. (in-court conciliator)

Twelve mediators mentioned the need for beginning mediators to learn about marital relationships and roles of women in different cultures. For example, they wanted new mediators to acquire information about paternalism; the amount of subservience expected of women; the social pressures exerted on couples with respect to divorce and family reorganization in different cultures and ethnic groups. Predictably these matters could affect each disputant's negotiation power. Eleven mediators mentioned the need for mediators to acquire an understanding of or sensitivity to different child rearing practices:

> I think that [ethnic/cultural knowledge] is very important. It is absolutely essential, particularly in our work, where we have a large ethnic population. A lot of them are going through the process of divorce. I don't think we have got it right yet. .. And although we have this philosophy that parents know best, it may be that a child is being brought up in a much wider family group and it may be that someone else who knows the child best - [someone] who has the child from birth. Perhaps it has been shared care. (in-court conciliator)
>
> #1: In conciliation you are trying to help them be parents in the way they

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69 We must exercise caution here. I have not done ethnic/cultural research to justify or discount the accuracy of the practitioners' comments. The practitioners who worked in the courts had acquired considerable experience working with families of differing ethnic and cultural backgrounds but it is possible for individual practitioners to have formed erroneous conclusions.

> want to be parents and if you don't know what the norms are about bringing children up, it is very difficult to do that. #2: Most definitely essential. (two in-court conciliators)
>
> #1: Oh, God, there is another awful one which is essential, but we don't have it really. #2: That's right. I would say essential. It is really essential with the Asian families we get here. We only have a minimal clue about the culture operating, about child rearing practices, marriage. I'm thinking of a court-welfare officer who assessed a mother [during a court-welfare report] as being distant from her child during supervised access until someone pointed out that in that culture people don't touch anyway. And in some cultures it is almost a form of child cruelty not to have them sleeping in the same bed. #1: Essential and totally unaddressed. One of my bitter complaints about the social awareness training: it is all about structured principles. And you ask anyone and they would all say they want the things we have been talking about addressed. .. #2: And the role of men and women is altogether different .. and the role of the extended family. .. We struggle along picking up bits. (two in-court conciliators)

Also mentioned (by 11) was the importance of mediators understanding the potential effect of religious practices on the matters to be covered in the mediation process:

> Yes, because in many ethnic and religious areas, [you need to know about] the marriage contract, the religious ceremonies et cetera, which are an important part of the breakdown. (out-of-court conciliator)
>
> For example, there are certain nuances in our religion which only a Jewish person can understand: bar mitzvahs have to be sorted out, the father may want access to take the boy to the synagogue. All this sort of thing and what happens at the festivals. The passover is coming up. [The mediator needs to know] who goes where. .. The same with Asians. They are split into Hindi, Muslims, Sikhs. You would have to have a pretty good knowledge of all that. (out-of-court conciliator)
>
> You need to know that there are differences between the Muslims and Hindus, Punjabis, .. that certain ones are likely to be from fixed marriages and that dowry is passed and can become a major issue on divorce. You've got to have a rough idea but then there are occasions when you have to explore beyond it. And I'm not too proud to ask. ... to tell them I am interested and to ask them if it is all right to ask them some questions because it will help me to better understand. (in-court conciliator)

Other practitioners (6) mentioned the importance of mediators gaining an understanding the differences in non-verbal communication or body language among ethnic and cultural groups:

> #1: Essential. ... What about that family we had. It was almost as if when they said 'yes', they meant 'no' and we didn't know what they meant. #2: Yes. #1: Yes, even the body language is different. You can't tell what we are even talking about with some cultures. ... I don't know if they are smiling because they are happy, unhappy. .. When you work with different cultures you realize how much you rely on body language. (two in-court conciliators)

Also mentioned (by 5) was the importance of understanding different legal expectations:

> They are coming under British law but we have got to have an understanding that their expectations in the family situation are different. .. We did a [court-welfare] report on Sikhs and both acknowledged if she had made her application in India she would never have had the boys. [They] would be the husband's property. And it was important to get him to understand that she hadn't stolen them by doing it under English law. The most difficult task there was not the disagreeing, but the husband's understanding, from his own culture, that they were his property and he had a right to them. (in-court conciliator)

Four specifically mentioned the importance of understanding the different styles of negotiation that exist among different peoples.[70] Other practitioners (9 and 6 respectively) did not identify areas of substantive knowledge but stressed instead the need for mediators to learn to be open and sensitive to ethnic and cultural differences, and to novel child arrangements. For example:

> That is a difficult one. It is like the law questions. You can get someone from any country under the sun. The essential thing is the open mind and listening skills. If we were in an area where you had particular cultures and were going to get a lot of them, then, yes, it makes sense to have an understanding. ... This is a difficult issue. How much do I need? I think the important thing again is self awareness and about being able to listen and understand. Hopefully to get from the parents what it means to them, because it is not only their culture, but what effect that has had on that particular person. (out-of-court conciliator)

> The important thing is to accept [that] the people have different ethnic and cultural backgrounds from your own and that what is going to work for them wouldn't work for other couples. And if they are putting something that is important for them in their ethnic/cultural background, you need to put aside your own notions of what it should and shouldn't be and do the old business of throwing it back to them .. because you must never forget you are only the means by which they are communicating with one another. ... That is the important thing, not whether you can understand, but whether they can understand one another. (out-of-court conciliator)

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70 See also, for example: H. Edwards and J. White (1977); I. W. Zartman and M. Berman (1982): 226-8.

> Certainly an awareness of cultural differences, that is very important. .. It is not necessary to know in detail, because it isn't possible to know that in detail, but an awareness that there are different standards, different values, different mores. Therefore mediators should be able to understand that people could reach an agreement which might seem unwise to the mediator - for the mediator to be sensitive to the context in which the couple are making the decision. (out-of-court conciliator) [71]

One practitioner considered this subject so crucial that he did not think mediators should attempt mediation with people from other cultures:

> Impossible. The only way you can work within any agency is within the confines of your own cultural group. ... It is asking too much to ask them to work with people from oversees when they have no understanding of the cultural influences in which people are caught, marry, the role of the grandparents and other significant people - and the history and how they manage conflict within their society. .. I think you have to develop services which are manned by people from that particular culture. ... You wouldn't understand what was being said. (out-of-court conciliator)

Certainly the amount of knowledge a mediator will need from this area will depend on his or her geographic location. The practising mediators have identified here the amount and type of knowledge they thought required of those serving large urban populations or of those serving families from other cultures.

Correction of Communication

In chapter 4 we saw that 73 practitioners identified 'improving communication' as one of the goals of the mediation process. We examined the scope of that goal and discovered that, when the practitioners defined or explained it, most were talking about improving communication in the mediation process, and not about long-term therapeutic change. All of the practitioners hoped to improve the disputants' communication with each other on at least a short term basis.

When the practising mediators spoke of the matters they thought new mediators should learn, their responses reflected this limited focus:

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71 It appears that the courts will take a slightly different approach. It seems that the English courts may consider the norms and values of a child's society of origin only as long as those do not conflict with the minimum acceptable standards of child care in England: Re H (Minors) Family Law Vol. 17 (1987): 196. The clash of two or more cultures can make determinations of fairness, equity and the best interests of the children very difficult indeed.

> [Communication skills are] essential. You have to be able to interpret what the clients are saying and to move up or down to their level. ... [*Do mediators need to understand communication theory?*] No. [*Do they need to know how to correct communication problems?*] You can't presume to correct in the sense of saying you can't or shouldn't do it such and such a way. But in the session, you can suggest other ways of saying things, you can draw attention to the form of the communication occurring in the room by drawing attention to it and its effect. (out-of-court conciliator)
>
> [*Does the mediator need to know how to correct communication problems?*] #1,2,3: Yes. #1 If you mean when you help a couple to see that they are double binding,[72] something like that, yes. #2: Or if they are only hearing what they want to hear, which is what happens. #3: We do that naturally. #2: Yes, [the mediator has to ensure that the] communication is clear and that everyone understands it. (three in-court conciliators)
>
> Yes, the mediator needs to know how you can improve methods of communication between people: what methods, what kind of words [to use], what is the correct timing. The actual procedures are so - that would be important. ... You have to check out that people are hearing, and perhaps explain what they are missing. (out-of-court conciliator)
>
> [*Does the mediator need to know how to correct communication problems?*] Yes, in terms of what I was saying earlier - the mediator can facilitate communication, not so much by correcting as by putting some structure into the interview. ... It is not only communication, it is also listening. If the mediator can facilitate the listening and communication exchange, then fine. If the mediator is equipped with certain communication skills, knowledge and understanding, he might be better able to do that. (in-court conciliator)

In addition to the limited focus, the practitioners' comments disclosed a dislike of academic theory. Practical, experiential training was recommended instead:

> [*Do mediators need to be educated in communication theories?*] #1: Not academically, but you need a good working knowledge of communication. You need to be a good communicator and to know what stops people from communicating. I don't know what communication theory is about. You need a practical working knowledge of communication. #2: Yes, I agree with what [#1] said. (two in-court conciliators)
>
> I see as essential anything which enables communication. Having said that, when you come to theory, I go a bit funny. Theory is not relevant. (in-court conciliator)
>
> #1: Communication theory is essential: how you talk to people, how to

72 When people 'double bind' they inappropriately link together demands, statements, or behaviours that are inconsistent or even contradictory, thereby preventing the recipient from responding positively. An example might be the mother who combines allegations that the father keeps interfering in her life with statements that he does not act as if he cares for the children. No matter what the father does, he fails. Or someone might be said to be 'double binding' if they combine a verbal statement that says one thing with non-verbal behaviour that portrays the opposite.

> ask questions. #2: I am having trouble with labels. .. You should be able to communicate effectively .. so, yes - the knowledge - but there is something daunting about calling it theory. [*So should there be a discussion on how to communicate effectively?*] #1,2: Oh, yes. ... #2: I am getting caught up with the difference in theory and practice. I want practice: if I ask you a closed question, I know it will be a different response from an open question, or I can load a question, but I see that as being more practice than theory, but I can see why you could say it is the other. (two out-of-court conciliators)

These comments help to explain why, when the practitioners were asked about the need to for mediators to be taught communication theory, which has academic rather than practical connotations, only 51.3% thought the knowledge important:

TABLE 12-1
Communication Theory

Essential:	35	(43.8%)
Very Helpful:[73]	6	(7.5%)
Helpful:	28	(35.0%)
Low Helpful:[74]	7	(8.8%)
Not Relevant:	4	(5.0%)
Total:	**80**	

They also help to explain why, when the question was phrased in procedural rather then substantive terms, and the practitioners were asked about the importance of mediators acquiring communication skills, the number of practitioners stressing the importance of the subject jumped to 93.1%:[75]

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73 Very helpful was not offered as an option. These practitioners created the category because they were not comfortable with either the 'essential' or 'helpful' designations.

74 'Low Helpful' was also not offered as an option. Practitioners suggested this option when they did not think a subject needed to be included in the mediator's training but when they did not think the subject of absolutely no value.

75 Communication skills were considered in chapter 11.

TABLE 12-2
Communication Skills

Essential:	92
Very Helpful:	2
Helpful	7
Not Very Helpful	0
Not Relevant:	0
Total:	101

It would appear that the majority of the practitioners thought it important for those educating mediators to include in their programmes discussions and examples of all sorts of inter-disputant and mediator to disputant communication problems, with examples of the ways mediators could intervene to correct or to lessen the effects of those problems. Examples might be drawn from a variety of the disciplines which deal with conflict: from the social work, counselling, and therapeutic disciplines as well as from the dispute- and conflict-resolution disciplines.

Recognition Of Child Behavioural Problems

Generally, the practitioners did not think that mediators should be assessing children. They definitely did not think mediators should be attempting treatment or correction of children's behavioural problems. Those who recommended that mediators receive some education in this area, spoke of the need for mediators to acquire a good understanding of the ways children respond to stress and family reorganization; and/or[76] they said they wanted mediators to know enough about child behavioural problems and methods of correction to be able to make appropriate referrals.

Mental Illness

There was considerable practitioner disagreement over the importance of this subject. Some thought it essential to include discussions about mental illness in the mediator's

76 Practitioners were never limited to a set number of comments on any topic.

training[77]; others thought the subject should be omitted. None of the practitioners thought it part of the mediators' role to attempt to redress the more serious forms of mental illness, and few were prepared to proceed with mediation in such cases.[78]

Those who advocated including this subject in the mediator's training usually asserted the inappropriateness of mediation in these circumstances as the reason for their view. They wanted mediators to be aware of mental illness[79] in order to know when to halt negotiations:

> Yes, [the ability to detect mental illness is] vital. It is one of the big caveats. .. I mean, if somebody is seriously disturbed, not only will you handle them very differently, .. but you will be in a better position to assess whether or not mediation is a relevant process for them. (out-of-court conciliator)

> It is important to be able to detect it because you might not be able to conciliate because it is there. If you've got schizophrenia, an excessive personality - as a counsellor I would have some knowledge of it, and I would refer it to a doctor. But not to treat it. That is not our role as a mediator and conciliator. .. We are not trained. (out-of-court conciliator)

> Well yes, if you could. I would want enough [training] for people to be aware enough to go away and get some supervision ... I'm not really sure - to go back to one of your earlier questions - whether you can work with someone who is mentally ill. [It is] pretty dangerous. Yes, there should be some discussion [in the mediator's training] of psychiatric disorders. (out-of-court conciliator)

Others recommended that this subject not be included at all, because they were concerned that undue attention to the issue could warp the mediation process:

> Well, if you are talking about voluntary conciliation and working on the assumption that you have two competent parents, the responsibility is with the parents. We are not in the business of making judgements about whether they are competent ... In the court-welfare role, where you have to make assessments, then yes. In conciliation your assumption is parental competence. If you were worried that ... a child [is] at risk, you would refer it to another agency. (out-of-court conciliator)

> If you get too far into this then, instead of relating adult to adult in

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77 See also: L. Parkinson (1980): 140.

78 See Appendix A-1, particularly Service 16.

79 During the course of the interviews the practitioners were asked to identify situations making mediation impossible or extremely difficult. Mental illness was one of the situations most commonly identified (by 33 practitioners), after the inability to accept the end of the marital relationship (identified by 45 mediators) and child abuse (also identified by 45 mediators).

> which case responsibility is back with the people, if you are dealing with thousands of people in which one half is terribly ill ... [concerns about] child abuse and what have you could dominate the agency. And that is my fear. You would be very afraid of missing something and very cautious about what they say and what you do. Then you are creating an entirely wrong atmosphere. You have got to take normality as being evident and around in almost every case. And you cannot train at the very low point at the cost of training in negotiation skills, techniques and strategies to change the pattern of the dispute. [80] (out-of-court conciliator)

Or they were concerned that a little knowledge could be more dangerous than none at all:

> It is such a specialized subject. When someone is going through a divorce, they may exhibit all sorts of hysterical behaviour and I wouldn't like mediators to diagnose. (out-of-court conciliator)

> That is tricky and dangerous ... No mediator, court-welfare officer, whoever, can ever intrude with any degree of certainty. I don't think a mediator could ever be sufficiently trained to detect mental illness. (in-court conciliator)

> One can argue about whether you can anyway. At the level of court-welfare officers or conciliators, we are not going to be able to do that anyway, even with training. There is a danger in one-half doing the job. To be good enough to recognize mental illness, you have to be a specialist in mental illness. For amateurs to think they can do it - and I think of myself as an amateur - .. is dangerous. ... Give them nothing rather than an amateurish course. (in-court conciliator)

Even those who identified the need for mediator education and training in this area did not agree on the appropriate level. While none suggested that mediators be able to diagnose mental illness, some suggested the need for mediators (or their co-workers) to have had a fair amount of related professional experience:

> To reiterate what I said before, one would assume that the people [practising mediation] would have this. The problem is one of training. If the people don't have this knowledge, you are going to have to do a year's full time training course to give it to them. (out-of-court conciliator)

> Yes, I would think we [court-welfare officers] have an advantage there, because all court-welfare officers have worked as probation officers and invariably as a probation officer, they would have had cases involving .. mental patients ... The major thing is to have a reasonable idea of whether or not someone is psychotic and I would expect any officer

80 The practitioner is concerned that those with experience or knowledge of mental illness area might be inclined to assume and look for illness.

> coming into this to have a fairly competent knowledge of this. (in-court conciliator)
>
> I'm sure that is important, but I'm sure people pick that up. I don't think you have to be a psychiatrist to do this ... (*So even without training then?*) No, I'm not sure about that. No, I think one needs some training for that ... I suppose what I am saying is that most people who are dealing in a profession, say in law, you get to recognize mental illness. I'm not saying you will appreciate all the implications .. but [the mediator needs to recognize] someone who is depressive and is functioning at a low level, although one might have difficulty in recognizing it as being mentally ill as distinct from just being depressed that day. That would need special skills and I'm not sure that mediators .. [need to] know how to recognize that. .. I would find that fascinating but would not spend a great deal of time on it [in mediator training]. (out-of-court mediator)
>
> Well yes, it would be nice, but I would have thought that would take years of experience. I don't see how you are ever going to be taught that. (*So someone on the team?*) I think it is useful to have a team: someone who had psychiatric social work and someone who has the legal knowledge. So in a way, by going through these questions, we are answering one of the questions you put to me earlier about the benefits of co-working. I think it is a good idea to have a team, with people from different backgrounds in these areas, because these are things that can't be drummed into people in a 2 hour or even an 80 hour section [of a course]. (out-of-court mediator)

Others suggested that common sense and sensitivity would suffice:

> #1,2,3: Yes. #2: One should seek a referral there. You are not a specialist. #4: I'm not sure how much of that you would need to know. No more than - #2: I think you need to refer. #1: I am thinking of the one recently who said, .. 'I can't sleep'. She was clearly depressed. We are not in a position to treat her or even to refer her but [we need] to at least recognize what is going on. # 4: You don't need to be trained to do that, though. [*Do you need special training?*] #1: It is obviously experience. #4: In terms of what goes into this course [to train mediators], no. (four in-court conciliators)
>
> I don't know about that. This is a difficult one. .. As a probation officer, we have lectures on this. You get into dangerous ground when you give people a training which is really just giving them a grounding. We are not mental health officers. I think a lay person is sometimes as good as anyone else at detecting when someone is saying [inappropriate] things, so I am not sure about this one. I wouldn't think it essential. (*Somewhere between helpful and not relevant?*) Yes. (in-court conciliator)

It is difficult to reconcile these views. It seems most practitioners agreed that there should be some discussion of what mediators should do when faced with disputant incapacity, but beyond this, there was little consensus. Some advocated that mediators should have professional experience or general training on the more common types of

mental illness. Others preferred to leave this matter to lay experience and common sense. At the very least there would appear to be a need for educators to expose beginning mediators to the issues, to some of the more common signs of mental disability, and to a discussion of the mediator's professional responsibilities in these cases.

Family Systems Theory

There was a great deal of debate among the practitioners about the relevance of family systems theory to mediation. We shall examine this debate in some detail here because we find multitudinous assertions that family-systems theory and family or divorce mediation are connected or related in the mediation literature. In Table 11-1 we learn that only 43.1% of the practitioners stressed the importance of teaching family-systems theory to beginning mediators. There has also been some disagreement among educators and trainers of mediators in the United States about the importance of this theory.[81] Greater London's family law practitioners also failed to endorse the importance of this subject.[82] This does not appear to be consistent with the mediation literature. There we see that many have advocated the need for mediator training in this area.[83]

We might start our search for an explanation for this difference of opinion with a look at the levels of education the mediators reported having in this area themselves. In chapter 3 we saw that 52.3% of the practitioners[84] reported intermediate to extensive levels of formal education in family systems theory and that 43.6% reported intermediate to extensive reading on the subject. If our assumption that people tend to

81 E. Koopman (1985a): 125.

82 For further particulars, see: Linda Neilson (1990).

83 I.e.: M. Baker-Jackson, K. Bergman, et. al. (1985): 70-71; N. Brown and M. Samis (1987): 51; D. Brown (1982): 22; S. Brown (1985): 49; H. Gadlin and P. Ouellette (1986): 101; I. Gee and D. Elliott (1990): 100; F. Gibbons and D. Elliott (1987): 14; S. C. Grebe (1986a): 55, (1988b): 16; J. Howard and G. Shepherd (1987); H. Irving and M. Benjamin (1987); E. Koopman, A. Dvoskin, et. al. (1987): 7; P. Maida (1986): 51; H. McIsaac (1986-7): 40-44; L. Parkinson (1987e): 192, (1987a): 149; M. Robinson and L. Parkinson (1985): 357; D. Saposnek (1983a): 37, 134; G. Sargent and B. Moss (1986-7): 87. But see: G. Davis (1983a); M. Roberts (1990a): 6.

84 The percentages are of those practitioners (88) who returned questionnaires.

place high value on their own education and to discount the importance of education they do not have is correct, we might expect the fact that a substantial number of the practitioners were not well schooled in this area to have affected endorsement levels. We might also note, however, that the levels of practitioner endorsement of this subject did not exceed the numbers having high levels of training in this area. We might want to compare this situation with that encountered when we looked at some of the subjects given higher ratings, for example, custody and access law, the psychological effects of divorce on family members, and child psychological development. In all cases the percentage of practitioners endorsing the need for mediators to have education in these areas far exceeded the percentage claiming to have intermediate or extensive levels of education.[85] It appears, then, that we must look for additional explanations for the practitioners' reticence to endorse this subject.

In Table 11-1 we learn that the need for mediators to acquire knowledge of family interaction was endorsed by far more practitioners than was the need for them to understand family-systems theory. We have already mentioned several possible reasons for this. We noted in particular the practitioners' doubts about theories and theoretical models and also their apprehensions about mediators assuming expert power. We have also noted the practitioners' endorsement of the need for beginning mediators to have or acquire a practical - rather than theoretical - understanding of those aspects of family life which could affect a family's dispute-resolution process. Was there also something in family-systems theory itself which concerned the practitioners?

The family-systems theories form one of the major schools of thought within the family-therapy field. While there were some differences of opinion, we saw that most practitioners did not approve of the integration of therapy in mediation. We looked at some of the reasons they gave for that view, particularly the conflicts between

85 For example, 53% of the practitioners reported intermediate to extensive levels of education in child psychological development but 84.2% thought mediator education in this area very helpful or essential.

disputant power and the role of the expert using substantive or procedural direction. We also noted that the consumer research shows that most clients want those helping them to focus on the resolution of the problems they present; that they want practical rather than insight-oriented or relationship help; and that they appreciate best those workers who appear to share their perceptions. We shall find that these criterion do not fit the family-systems model. We also found that the researchers have not yet been able to establish positive connections between the use of family-system methods and success or consumer satisfaction, particularly in cases of divorce and family reformation.[86]

Before we discuss the practitioners' comments and suggestions, a few words about family systems theory are in order.[87] Family systems theory is difficult to define, as it is really many theories or schools of thought. The theories differ in their assumptions about which aspects of 'family', and which relationships among its members, help to explain human behaviour. Adherents, therefore, do not always make the same assumptions nor use the same methods. For example, some family system theories focus on the family's boundaries with and relationship to the outside world. Other theories focus on the structure of the family and the roles of the individuals within it. Yet others do not consider structure to be important but focus instead on interactions and communication patterns[88]. Still others concentrate on aspects of the family's members' perceptions of reality.[89]

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86 See: R. Emery (1988) 113-88; J. Fisher and H. J. Eysenck (1976): 142, 332-3; A. Gurman and D. Kniskern, (1981a): 750; H. Johnson (1986): 301; K. Kressel (1985): 122; K. Kressel, F. DeFreitas, et. al. (1989): 66-7; D. Olsen, (1985): 675; P. O'Reilly and E. Street (1988): 162; B. Sheldon (1986): 223; D. Sprenkle and C. Storm (1981): 284; A. Vetere (1988): 340-7. In fact there is now a growing body of criticism and concern about family systems theory and its methods, for example: D. Howe (1989); H. Johnson (1986): 299; M. Roberts (1990a): 6; S. Walrond-Skinner and D. Watson (eds.) (1987).

87 Much of the theoretical discussion about family-systems theory first appeared in: L. Neilson (1990).

88 This group includes the Milan school of family therapy, see Appendix A-1, service 16 and: L. MacKinnon (1985): 100; M. S. Palazzoli, L. Boscolo, et. al. (1980).

89 The Milan school also fits within this group: T. Anderson (1987): 415; J. Burnham and H. Queenie (1988): 51; D. Campbell, P. Reder, et. al. (1983): 11,15,17, 25, 36; D. Campbell, R. Draper, and C. Huffington (1989): 18-20, 51, 58; G. Cecchin (1987): 412; L. MacKinnon (1985): 103, 106; A. Treacher (1985): 247. See also Appendix A-1.

The theories do exhibit some similarities, however. Most of those who subscribe to a 'family-systems' perspective start with the belief that much of human behavior can be understood by examining the interactions and relationships among the members of the family unit. For purposes of analysis, the family is viewed as an organic whole which affects and is affected by the actions and reactions of its parts. Explanations for human behavior are sought from relationships or interactions within that unit, between the unit and its members, or between the unit and the outside world, rather than from the individual psyche. The belief in cause and effect is viewed as simplistic: all interactions and behaviors are seen as being caused by but also producing the interactions and behaviors of the other members of the family unit and of the unit itself.

All those who *apply* 'family systems' focus on some aspects of 'family' rather than on the problem or dispute itself. The family's definition of its own problem is commonly dismissed as the 'presenting problem'. The issue is then reclassified as a dysfunction, or imbalance occurring in one of the aspects of the family unit. Those applying the theory assume that if they can change the interactions or relationships seen to be producing the family's problem, or the family's understanding of those problems or relationships, they will thereby free the family and its members to make the changes necessary to respond effectively to the problems they face.[90]

In order not to contribute to the existing confusion about the relevance of family-systems theory to mediation, it might be wise to point out that not all the mediators who say they use a family systems approach actually do so. Helpful background knowledge is being confused with application. The literature on family-systems theory contains some theoretical constructs which can be helpful in

90 For an overview of the family systems theories, see for example: G. C. Barnes (1984); D. Campbell and R. Draper (eds.) (1985); D. Campbell, P. Reder, R. Draper and D. Pollard (1983); I. Goldenberg and H. Goldenberg (1985); A. Gurman and D. Kniskern (eds.) (1981); W. Dryden (ed.) (1985); Irving and Benjamin (1987); B. Miller and D. Olsen (eds.) (1985); O. Manor (1984); S. Minuchin (1974); M. S. Palazzoli, L. Boscolo, et. al. (1980); V. Satir (1967).

conceptualizing how the family and its members react and adapt to change and the problems they face in the reformation that follows separation and divorce. For example, it is helpful to understand that when people interact, the effect is reciprocal; to understand that different members of families fulfill different roles and meet different needs of the children; and to understand the difficulties of blending families, given the needs of each newly formed family for boundaries and privacy.[91] An understanding of the theory can also help to remind mediators of the importance of considering the relationships and interests of all family members during the mediation process,[92] and of the mediator's professional responsibility to all disputants.[93] When used in this way, however, the theory is being used as a conceptual aid.[94] It is not necessarily being applied.

If family systems theory is applied, the family's definition of the problem (e.g.: 'where is the child going to live?') is changed into the family-system expert's definition of the problem (e.g.: 'what is the dysfunction within this family that is preventing its members from reaching agreement and how can that dysfunction be corrected?'). If family-systems theory is used merely as a conceptual aid, conciliation/mediation continues to be a dispute-resolution process which deals with problems as the family understands them and treatment of 'dysfunction' is left to others. Application of a family-systems model results in a very different process.

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91 a) Not all those who stress the importance of family systems theory stress these matters. In fact many stress instead the family's continuation and focus on the nuclear family which existed in the past, for example: G. Barnes (1984): 21; C. Barton and J. Alexander (1981): 407; N. Brown and M. Samis (1986-7): 51; I. Goldenberg and H. Goldenberg (1985): 29, 37, 54, 67; H. Irving and M. Benjamin (1987): 60-7, 70, 75, 94; G. Jacobson (1983): 4; S. Minuchin (1974): 48-64; V. Satir (1967); A. Treacher (1985): 252. As we shall see, this theoretical focus on the past worried the practitioners.

b) I do not mean to suggest here that the matters I have identified in the text are exclusive to family systems theory, see: M. Roberts (1988): 16.

92 I.e.: E. Koopman and E. J. Hunt (1987); R. McWinney (1988): 36; A. Milne (1988b): 386-7; M. Robinson and L. Parkinson (1985): 363.

93 J. Folberg (1985): 415; A. Milne (1988b); 386-7.

94 Some have suggested that the theory is useful only as a conceptual aide: W. Reid (1978): 216; A. Treacher (1985): 251. Those who continue to support the use of family-systems theory in mediation are beginning to suggest that the theory be used merely as a conceptual aid or way of thinking: ie.: J. Walker and M. Robinson (1990): 62.

Many of the practitioners who endorsed the need for mediators to have training in family systems theory, used the conceptual aid versus application distinction. They argued that mediators should have some understanding of family-systems theory in order to understand or conceptualize how families operate, but cautioned that the methods or model should not be applied or used in mediation. For example:

> From theoretical training you can learn to pick up the hidden messages, body language, the victim syndrome. There is so much stuff you can pick up. You need an understanding so you can do so, so you can understand more quickly. I am not suggesting anyone should be doing therapy [in mediation]. That would be quite wrong, but you do learn the skills, which are quite useful. (out-of-court conciliator)

> The therapeutic training is helpful because it helps you to understand a bit about what is actually going on, even though you can't change it. But when it comes to being effective, it is really a matter of knowing about dispute resolution. I don't think there is any question about doing therapy .. it is merely that if you have done some therapy type work with families, you are going to be able to tell what the families are up to and then apply some dispute resolution. (in-court conciliator) [95]

Perhaps the application-versus-conceptual aid distinction explains why, when only thirteen of the practitioners were in favour of including therapy in mediation,[96] forty-four said they thought family systems theory training very helpful or essential for new mediators. Perhaps it also explains why the practitioners assigned lower priority to family systems theory than do the authors of the mediation literature. Certainly the works of both A. Milne and J. Folberg suggest an endorsement of the use of family systems theory as a conceptual aid, and not as a method of practice.

Some of the practitioners endorsing mediator training in this area said that they thought mediators would need to use family systems theory to a limited extent: to help parents separate their spousal from parental roles. We will remember from chapter 4 that eleven of the practitioners identified this as one of the goals of mediation. It is

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95 Interestingly most of those who have tried to link family-systems theory to dispute resolution practice have been unable to do so. For example, H. Irving and M. Benjamin (1987), and H. McIsaac (1987). In both cases as soon as the authors begin to describe the mediation process, they switch to a description of linear, dispute-resolution methods.

96 See chapter 6.

interesting to note, however, that these eleven were not all in full agreement about the importance of family systems theory. Four gave family systems theory low priority. This is because one can attempt to attain this goal by applying family systems theory, by using of family systems theory as a conceptual aid, or by applying dispute-resolution techniques drawn from other disciplines, depending on whether the mediator is seeking therapeutic change or is seeking to enable the disputants to resolve their own disputes/conflicts.[97] Only a small minority of the practitioners thought mediators need education in family systems theory in order to be able include family therapy in mediation.

Many of the practitioners, both those in favour of mediators receiving training in family systems theory and those against, voiced their reservations about the application of family systems models in practice. They were concerned about the relevance of the theory to the divorce process in general and to the mediation process in particular. Perhaps we should look to these concerns, rather than to the practitioners' education and training, for an explanation of the ranking given to this subject.

The practitioners were bothered by family systems theory's emphasis on the continuation of the family precisely at the time when the family is trying to cope with separation, change and reform.[98] They were concerned that this could prolong the length of the emotional divorce process and generate unrealistic fantasies of reunion or cohesion: [99]

> I think [with family systems] you are working on the wrong base. You say you are doing family therapy but there is no family. It is in two

97 For discussion of this and the other goals of mediation, and the place of family therapy in mediation, see chapters 4 and 6. For others who have stressed the importance of mediators understanding family systems theory in order to help the parents separate their spousal from parental roles, or in order to help the disputants restructure the family(ies) after divorce, see: E. J. Hunt, E. Koopman, et. al.; H. McIsaac (1986-7): 44; M. Robinson and L. Parkinson (1985): 374; D. Shearer (1990): 7; S. Steir and N. Hamilton (1984): 741.

98 See also: C. Clulow and C. Vincent (1987): 33, 181; J. Goldman and J. Coane (1977): 362; G. Jacobson and D. Jacobson (1987): 337; K. Pasley and M. Ihinger-Tallman (1989): 46.

99 See: G. Jacobson and D. Jacobson (1987): 338; G. Jacobson (1983): 4, 75; H. Johnson (1986): 303; K. Kressel (1985): 111; D. Sprenkle and C. Storm (1981): 284.

parts. It has reformed. To actually work something out about that family is nonsense. It is about parenting. ... I don't really see that it family systems] belongs [in mediation]. It encourages dependency. I watched a therapist try to work out the exchange of family presents [at Christmas] as if it were a family Christmas and I thought, 'why?'. Who says these people ever have to necessarily meet? Yes, it would be nice if they could meet and smile at each other and talk, but since they are not, and are extremely bitter, then surely it would be better that the children don't see that! Maybe they never talk again. It was all crazy - yes, if it is a family but these two people had gone their separate ways. Supposing he had married again, supposing he is in his fourth marriage, .. where is the family therapy in that? .. It was unreal watching them try to bring it [the pre-existing family] to an improved state. (out-of-court conciliator) [100]

We used family therapy with a step-family. I think the value of family therapy is with a complete family, or a family unit which is readapting as a family unit - where there is an investment in remaining together as a family - and then you can begin to work with them as a family. [In mediation] what they are doing is they are disintegrating and I have racked my brains thinking, 'How can I use family therapy when one half want to do one thing and the other one-half something else?'. .. I don't think family therapy is appropriate in this situation. It has it's place. .. What we are doing [in mediation] has to do with acknowledging people's wish to be separate. Constantly reinforcing this notion [that] you are still a family even though you are getting a divorce, isn't always to their benefit, and certainly it is very confusing for the children. ... They are coming here as a family and the word 'family' is being batted about when they are not going to be a family, at least not in the same way - and that has to be addressed somehow. .. You have to start treating the parents as separate units - because that is the reality. The messages we give, our expectations, and our respect for people's decisions not to be together - that is important. And it is the children's fantasy that the parent will still be together and if we perpetrate this, we are making it much more difficult for those children to come to terms [with their parents' divorce. We have to allow space - not only for the parents, but also for the children. And if we say, 'You are all together', then the children think, 'Oh good, they are going to help us stay all together', and you just make the whole thing that much more prolonged. (in-court conciliator)

No, I am not quite sure that [family systems] is appropriate, because we are dealing with the future, and the family structure is changing dramatically. So to use a family systems approach and to work out how that family works, I'm not sure I see the value of it. ... I personally think mediation is about starting again and the issue of the old family and putting so much emphasis on it - I'm not convinced that people need to focus so much on the old family when starting a new life. I suspect that they [those who wish to apply a family systems model] think the family ought to be in therapy and that perhaps there is still some hope for them. I also feel that families are tricked into family therapy with it and they didn't come for therapy. (out-of-court conciliator)

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100 An extract from this quotation first appeared in chapter 6.

Earlier in this section we talked about how family systems theory can be useful as a conceptual aid, for example, to visualize the problems of separation and reformation as joined but separate family units.[101] When we examine the theoretical literature more closely, however, we discover that the theoretical constructs and insights the family systems theories profess to offer flow from a focus on the intact, original, nuclear family. Family systems theorists attempt to explain human behaviour by referring to some aspect of the nuclear family: its structure; the roles of its members; the family's shared perceptions, rules, norms; the family's communication patterns and so on.[102] As the practitioners point out, as soon as one moves away from a focus on the original family to a focus on new family structures and relationships, and extended family networks in the process of formation, all these matters begin to lose their strength and meaning. Family systems theory itself illustrates why family systems theory is inappropriate during the divorce process, at least if one is working with the nuclear family: families units need to form boundaries in order to survive.[103] Presumably this applies equally to newly constituted families. If this is the case, then a continuing focus on the original family may in fact be dangerous. Nor does family systems theory's purported ability to illuminate family dysfunction help very much, because in divorce family dysfunction is a given: if there had been no dysfunction there would be no divorce.

The practitioners were also concerned that family systems' presumption of and focus on family dysfunction[104] conflicts sharply with mediation's presumption of

101 Some reconstituted family groups, particularly those without children, may sever all connections with the first marriage. Most of those with children, however, will continue to have some type of contact.

102 See footnote 91.

103 Arguably one can use family systems in this way but then all the other theoretical constructs begin to loose meaning. It is doubtful that at the point families are breaking up and reorganizing one can look to the family, its interactions; shared perceptions, norms, values; structure; hierarchy; and so on to explain behaviour because the family is no longer functioning as a cohesive whole. It is more probable that, as the divorcing family system looses strength and meaning, individual psyche and influences outside the family will have an increasing role to play in each member's behaviour.

104 For example: C. Barton and J. Alexander (1981): 422; I. Bennan (1988): 5-8, 10; P. Caille

disputant competence and autonomy: [105]

> #1: Milan therapy was designed for crazy people[106] - because it was designed for people who were so stuck there was no other way they could move them on without tinkering with them. #2: The Milan people[107] do actually say that Milan therapy lends itself particularly well to disputes about custody and access. #1: Is that what they say? #2: So they say. #1: It is nevertheless therapy and its origin comes from a different - where there is an excuse for it. It is like using drugs on people who are going to die anyway - I mean these people were crazy. ... It is probably the only kind of group work where you can actually cause a lot of damage:[108] either they think you're crazy or you damage them in some way. (two in-court conciliators)

> The therapeutic approach evolves from views about pathology, treatment, dysfunction, and when people come to make their own decisions, that should have nothing to do with it. Pathology and treatment have nothing to do with people who want to make their own decisions and I think the crisis of divorce is not an excuse to view people as ill or psychologically disturbed. [109] (out-of-court conciliator)

They were also concerned that a theoretical focus on the family system could cloud the mediation process: [110]

> [Family systems is] good background knowledge but not as a tool one can use in mediation. It may even get in the way. With my [social work] background, I needed to learn to divorce all that and talk to people

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(1982): 32; J. Carpenter (1989): 49; W. Dryden and P. Brown (1985): 302; I. Goldenberg and H. Goldenberg (1985): 97; D. Howe (1989): 58-9, 98-109; S. Minuchin (1974): 108-110; K. Nuttal (1986): 13; G. Sargent and B. Moss (1986-7): 94-5; M. D. Stanton (1981): 365.

105 See also: C. Clulow and C. Vincent (1987): 98; G. Davis and M. Roberts (1988); M. Roberts (1988): 17-18.

106 Milan family systems theory is one of the family systems schools of family therapy. In 1987-8 its methods were being used extensively by one of the family dispute resolution services in Greater London. See Appendix A-1, service 16 for a description and discussion. This quoted practitioner is at least partly correct. Milan was developed to treat schizophrenia and cases of anorexia nervosa: L. MacKinnon (1985): 99; M. D. Stanton (1981): 377. Therapists have warned that it should not be used for less serious problems: M. Crowe (1985): 231; F. Martin (1985): 16-17; M. D. Stanton (1981): 382. Others have warned that the model should not be used during periods of crisis: D. Stanton (1981): 382. Milan has little or no objective, comparative research support: J. Burnham and H. Quennie (1988): 67-8; A. Treacher (1987): 99; A. Vetere (1988): 346, but see, for example: M. Mashal, R. Feldman et. al. (1989): 457-70. See Appendix A-1, service 16 for discussion of this school's rejection of the legitimacy of research evaluation.

107 The speaker is referring to particular practitioners rather than to the family therapy literature and research.

108 There does appear to be a risk of deterioration in the use of many of the family therapies. See chapter 6.

109 Family systems theory would not view the individual as ill or disturbed, but would instead look to problems or dysfunction occurring in some aspect of the family unit. But the practitioners' concerns about the conflict between pathology or dysfunction and disputant competence and autonomy continue to apply.

110 S. Grebe (1985): 35; J. Kelly (1983): 39-40; L. Vanderkooi and J. Pearson (1983): 562.

> reasonably.[111] A lot of these things get in the way. (out-of-court conciliator)
>
> You end up trying to do too much and end up doing nothing well that way. (out-of-court conciliator)

Finally, the practitioners were concerned about the role of the mediator with respect to disputant autonomy. They did not think it appropriate for mediators to be assuming the power and expert status needed to make the enquiries and assessments required to apply family systems models and perspectives: [112]

> I mean I am a believer, if anyone is, in family systems. I'm just not sold on it being used in that setting in that way [in divorce mediation]. There is an arrogance about it and the one thing you don't need in conciliation is arrogance. You are most successful if you can say, 'I don't know anything about you or your family. You know more about that than I do. You tell me.'. (in-court conciliator)
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> #1: It [the Milan model][113] is neo-fascist in the way it applied on occasion. I think it is fundamentally inappropriate. ... It doesn't fit easily with the premise of empowering parents. I don't like putting parents into

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111 The practitioner probably means, 'on their level'.

112 For example: J. Howard and G. Shepherd (1987): 93; S. Minuchin (1974): 111-113; G. Sargent and B. Moss (1986-7): 93-4. See also: R. Becvar, D. Becvar and A. Bender (1982): 389; P. Caille (1882): 32; G. Davis and M. Roberts (1988): 8-9; D. Howe (1989): 9; M. Roberts (1988): 12-15; M. Roberts (1990a); A. Treacher (1987): 99.

113 See footnotes 88, 89, 106, and Appendix A-1, service 16. Practitioners with family therapy experience also had educational concerns. They said methods from the Milan school were being applied by people who were not fully trained family therapists, on the basis of very limited exposure:

> They [a group of court-welfare officers] have chosen the most complicated form of family therapy without properly understanding what they are doing. ... Some of these things could create mayhem unless they are carefully done and they are not always carefully done. And everyone is jumping on the bandwagon. Years ago everyone was a pseudo-psychotherapist applying pseudo-psychoanalytic ideas which had seeped into casework, and so of course it all went wrong, and so everybody jettisoned the model and look what they've got in.
>
> #1: The other thing is [that] I think strategic work [again the practitioner is talking about the Milan school, which is sometimes classified as strategic and sometimes as systemic] demands a lot of experience. ... And there they [a group of court-welfare officers] are after a week long course and they think they can do this. ... #2: The other thing that does disturb me about .. Milan .. is that they have actually not ever trained to practice Milan therapy. As someone two/thirds of the way through a (several year) family therapy course, I feel singularly inexperienced and unqualified even to attempt to do some of the easier family therapy, yet here are a group of people, who have never done any family therapy, training, practising and teaching family therapy.

> a model without explaining it to them fully - one which may be inappropriate to their needs - and then holding them within it. #2: Sounds like a powerful disempowering model. (two in-court conciliators)

> [In mediation] the choices and decisions are made by the parties concerned rather than being imposed by a third party and that is the value base underlying the mediation process. ... [People] get married, they don't expect to divorce. They might do these days, but generally they don't. When that possibility comes along .. they go to a place and what is very important is what kind of process they get sucked into - because if they get sucked into someone else's ides of what should be happening - .. like the systems approach: you go in one end and then come out the other. I think that is bullshit. The person I trust is the person who has a good grounding but is able to move beyond that [a theoretical model] and doesn't think their profession, their knowledge, offers all the solutions. (out-of-court conciliator)

> Also the therapeutic approach imposes on the parties the therapist's views of the situation, which involves an assessment of what is going on, their relationship, the dynamics - which I think has nothing to do with joint decision making, it is the parties' views which are important. The therapist mediator is posing as the expert, with the expert assessment. .. That is an distortion of the whole process. (out-of-court conciliator)

Several practitioners mentioned that they thought the matters of value to mediation from family systems theory were not exclusive to the theory:

> The family systems people claim that their approach means that all the parties' interests, including the children's are more effectively taken into account. But I would argue no one is viewed in a vacuum anyway and we don't need a family systems approach to take into account all those views. The mediator has a responsibility to ensure that the parties take everyone's views into account - and the children's needs are essential to any disputes over the children - but it is the parties themselves who consider those needs and it is presumptuous to contend that the mediator is more concerned with the interests of the children than are the parties themselves. You don't need a family system's approach to take into account the needs of children and not only the children but also of the grandparents. ... I don't know what else family systems offers. It just seems that the word 'systems' is added onto ideas which are perfectly common sense - to give authority to ideas such as the importance of [considering] .. the context in which decisions are made. But you don't need the word 'systems' to deal with it. (out-of-court conciliator) [114]

In fact we can find discussion of the reciprocity of human interaction and behaviour throughout the dispute resolution and conflict theory literature.[115] While systemic and circular thinking can be derived from the family systems literature, they are not

114 See also M. Roberts (1988): 16, (1990a): 12.

115 For example: J. Duke (1976); P. H. Gulliver (1979): 83-5; J. Himes (1980): 30-32; P. Wehr (1979): 19-20.

exclusive to it.

There are also indications in the literature that family systems theory's focus may be too narrow in that it ignores or down plays the importance of problems and conflicts occurring at other levels,[116] for example at the individual and personal, external and social levels.[117] This was another reason the practitioners did not endorse family systems theory more highly. As we saw, when we discussed the practitioners' views about the need for mediators to gain an understanding of family interaction, many hoped that this narrow focus would be emended if mediators were exposed to a variety of perspectives and approaches.

The practitioners' explanations for not endorsing family systems theory related to and were consistent with the roles of the mediator and the goals of mediation that the practitioners identified for us in chapters 4, 5, and 6. This suggests that the explanation for the low level of practitioner endorsement should be sought in the incongruities perceived between mediation and the family systems processes. The practitioners' comments as a whole suggest that those educating mediators should not be concentrating on trying to establish connections between family systems theory and mediation; that instead they should be concentrating on teaching students about those aspects of family life that directly relate to dispute resolution. We identified some of these when we discussed family interaction. From this section we might add the following matters: the need to teach mediators to remember to have the disputants consider the relationships among and the interests of all those closely connected to the children; the need to teach mediators to get the parents to view and discuss their dispute/conflict from their positions as parents rather than from their positions as (ex)spouses; the need to teach

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116 W. Dryden, D. Mackay, et. al. (1985): 293; J. Fargo (1986): 6; G. Jacobson (1983): 4; H. Johnson (1986): 300; A. Milne (1988a): 27-44.

117 J. Carpenter (1989); W. Dryden and P. Brown (1985): 302; W. Dryden, D. MacKay, et. al. (1985): 293; J. Fargo (1986): 6; M. Hetherington (1984): 12; H. Johnson (1986): 300; J. Johnson, L. Campbell and M. Tall (1985): 116; K. Kressel, F. DeFreitas, et. al. (1989): 55; A. Milne (1988a): 27; J. Wallerstein and J. Kelly (1980): 194.

mediators to remain professionally objective;[118] the need to teach mediators about the need for families to have autonomy/privacy/boundaries and about the problems families face when they attempt to integrate members from other families; and finally the need to ensure that mediators gain an understanding that all human interaction and behaviour is, to a large extent, reciprocal and responsive to a variety of personal, interpersonal and social influences. Perhaps some exposure to the family systems theories might help beginning mediators conceptually to understand some of the problems that occur when a family tries to resolve a dispute/conflict during the reorganization process. No doubt some of the family systems literature also contains discussions of particular interpersonal communication problems and strategies to deal with them that could be very helpful to mediators. The practitioners' comments suggest that mediator educators concentrate on these rather than on the family systems theory and or its methods as a whole. While these matters are not necessarily exclusive to family-systems theory, there is no reason they cannot be derived from the family systems literature as well as from other disciplines. The danger occurs when claims are made to disciplinary exclusiveness. This does not mean that mediators do not need to have any exposure to family systems theory, however. The practitioners do suggest that mediators ought to acquire enough exposure to the assumptions and methods used by those who practice family systems therapy to make appropriate referrals. The practitioners warn, however, that this particular theory should not be taught to mediators at the expense of all others.

In this section we have concentrated on the practitioners' views on the importance of family systems theory in some detail. It is important that we realize, however, that similar problems for mediation will arise with the application of any therapeutic model if that model involves expert assessments, the application of any particular theoretical model or models, and prescriptions for therapeutic change. As the following practitioner warns, therapeutic models and theories come and go:

118 This concept was first discussed in chapter 4 and was discussed in more detail in chapter 8.

> None of these things [shifting theoretical models] is specific to conciliation. It applies to all social work and probation. It is sort of the flavour of the month. Hopefully we can absorb some of this in a realistic way. Now in [the probation service's] criminal work it is all networking. [We] produce a label that everyone uses differently. (in-court conciliator)[119]

If we review the practitioners' comments in this section, the family interaction section, and in chapters 4, 5 and 6, we quickly discover that many of the worries the practitioners expressed here apply equally to every therapeutic model; they were not all exclusive to family systems theory.

Counselling Skills

Table 11-1 tells us that the practitioners gave relatively low priority to the need for mediators to acquire counselling skills. Greater London's family lawyers gave the subject higher priority.[120] This corresponds with the findings of the *Newcastle Report*,[121] but differs from the findings of M. Little, N. Thoennes, J. Pearson, and R. Appleford[122] in the United States, as well as the bulk of the mediation literature.[123] In chapter 11 we found that the practising mediators gave very high priority to listening, interviewing, and communication skills. At first glance this appears to be a contradiction. It is hoped that the discussion that follows will serve to explain that apparent contradiction, the same apparent contradiction that appeared within the *Newcastle Report*,[124] as well as that between the *Newcastle Report* and the M. Little et. al. study.

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119 We discuss problems with terminology and with the term 'networking' in particular in Appendix A-1.

120 See: Table 11-1 and L. Neilson (1990).

121 (1989): 103, 105.

122 (1985): 1, 4. They found that, almost without exception, mediators indicated that counselling skills were helpful in mediation.

123 The following authors, for example, have suggested that mediators should have counselling skills: M. Baker-Jackson, V. Hovespian, and G. Ferrick (1984): 23; J. Blades (1984b): 83; O. J. Coogler (1977): 5; Department of Justice, Canada (1988b): 152; J. Fargo (1986): 13; Frontenac Family Referral Service (1984): 3; F. Gibbons and D. Elliott (1987): 14; L. Gold (1985): 16; National Marriage Guidance Council (1982): 110; National Marriage Guidance Council and National Family Conciliation Council (1986): 5; M. Robinson (1982): 17; A. Taylor (1981): 6; R. Tolsma and J. Banmen (1984): 58. But see: G. Davis (1983).

124 (1989): 103.

Before we begin our discussions, we might note that the practitioners gave this subject a low ranking in spite of their own expertise in the area. In chapter 2, we noted that the majority (67.4%) of the mediators reported intermediate to extensive levels of formal counselling education, and that many had extensive, additional counselling experience. Thus the low rating given to this subject would appear to be particularly significant.

Table 11-1 tells us that 43 of the practitioners ranked counselling skills either 'essential' or 'very helpful'. Ten of these, however, specifically stated that they did not consider it appropriate for mediators to engage in counselling during mediation. (Twenty-two made no additional comments.) Herein lies the explanation for the contradictions in the research. While many practitioners thought it important for mediators to have some of the same skills that counsellors have, they did not think it appropriate for mediators to engage in counselling during mediation sessions.[125] This distinction should become clearer as we examine the practitioners' comments. It was for this reason that some practitioners even went so far as to suggest that counselling skills could be a drawback: [126]

> No, we have found in actual fact that [counselling skills] can often be a bit negative in a way - that in actual fact one has to sometimes overcome one's counselling training. It could be helpful but sometimes it is a drawback. (in-court conciliator)

> # 1: Do not counselling skills subsume all the rest of the skills?[127] It seems like a generic umbrella. Except that the hardest co-working I ever did was with a Marriage Guidance counsellor - because she counselled and I did something different. #2: I don't think it is relevant at all. For many people trained as counsellors, they have to unlearn all those things. Counselling itself is not particularly important. (extract from an interview with four out-of-court conciliators)

On the other side of the argument, we have those who considered counselling skills essential. For example:

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125 See also: Department of Justice, Canada (1988b): 152.

126 See also Chapter 9.

127 I had earlier asked the practitioners if they thought mediators needed interviewing, communication, and negotiating skills.

> You cannot really separate them [counselling and mediation]. Feelings are important, such as: anxieties over meeting again after 2 years, feelings of loss of the children. If long term counselling is needed, then you have got to refer them on. But sometimes you have to deal with and acknowledge those feelings before you can go on. I don't mean going into what happened to your mother. .. If the conciliator has counselling skills, the conciliator has to know how far he or she should go, always keeping in mind the focus is their [the parents'] dispute over the children. But you can't say, 'I'm sorry, we are not here to deal with that'. You may have to let the parents deal with those feelings first and then have another session to start dealing with the children's issues. Sometimes clients have real and immediate fears which have to be addressed before they are ready for conciliation. For example, .. the mother's fears her children will be taken away from her [by her husband's new partner]. Until they are ready to deal with those fears, they are not ready to talk about access. [If they have deeper problems] you may have to send them away for several months until they are emotionally ready for conciliation. (out-of-court conciliator)

The problem here is that it is very difficult to make absolute statements about the boundaries between mediation and counselling.[128] The differences appears to be of degree or emphasis. In many ways counselling would appear to be much closer than family therapy to divorce mediation.[129]

This was one of the reasons we found it difficult to make clear divisions between the practitioners with respect to their perspectives towards the inclusion of therapy and therapeutic processes in mediation in chapter 6. There we saw that while only thirteen of the practitioners were in favour of including therapy in mediation, another 28 thought it appropriate to include time limited counselling or crisis intervention in mediation when necessary. Even the 53 practitioners who favoured a dispute resolution approach did not seek to exclude all emotional content. They emphasized the importance of listening to, understanding and acknowledging the importance of these matters. The difference between the 28 and the 53 was that, while fifty-three of the mediators said they incorporated these matters into the dispute resolution process, those in the middle category indicated that they were prepared to let one or a limited number of mediation sessions turn into counselling or crisis intervention

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128 L. Parkinson (1985c): 217.

129 See also: J. Fargo (1986): 13; L. Gold (1985): 16.

sessions.

We run into problems as soon as we try to separate counselling from mediation because in some ways all 'professionals' who assist clients with personal problems use elements of counselling. Active listening, establishing rapport, soliciting information, being empathetic, using effective communication skills, are part of most professionals' roles. No doubt mediators need many of the same skills that counsellors need. In order to discuss the relevance of counselling to mediation, therefore, the practitioners found it necessary to separate the skills needed for counselling, from counselling per se. For example:

> If you mean empathy, warmth, positive regard, non-judgementality, and listening, then yes. But if you mean to actually counsel people, then no. That is not what it is all about. (out-of-court conciliator)
>
> There is a large overlap probably, but really, although there is an overlap of skills, because it is not counselling you are doing, [counselling skills are] helpful, rather than essential. (in-court conciliator)
>
> Counselling in its widest form, yes: listening, and feeding back - that sort of thing. Non-directive counselling is essential. (out-of-court conciliator)
>
> Not really. Not in conciliation, because you're not counselling. But I think in terms of the general ability to listen, to hear what they are saying, and to reflect that back to them, in that aspect of counselling - but not in terms of [soliciting] how they feel. Not that aspect of counselling. (out-of-court conciliator)

We see here that in fact there was a greater consensus among the practitioners than the ranking of 'counselling' would suggest. While the practitioners thought that mediators should have some of the same skills and personal attributes that counsellors have, only a minority were thought counselling should be included in the mediation process. Many did not rank counselling skills highly because they wanted to stress the differences between the two processes, for example:

> A good counsellor doesn't necessarily make a good mediator. There is a fundamental difference between the two. If you have the human characteristics to make a good counsellor, then you *can* make a good mediator. If you have a counselling hat on in a mediation session, that can be counter-productive. Again, there is a need for clarity here and there seems to be a potential therapeutic spin-off, but that is not the

> focus [of mediation]. [Mediators need] the human characteristics necessary to make a good counsellor, but counsellor training is not important. (out-of-court conciliator)

Perhaps the reason Greater London's mediators gave the need for mediators to acquire counselling skills a lower rating than have mediators elsewhere was because Greater London's mediators had an opportunity to separate the importance of the skills needed by counsellors from the importance of counselling expertise per se. Greater London's family lawyers were not offered that option.[130] Perhaps, therefore, some of the lawyers may have endorsed the importance of counselling skills because they considered the skills needed by counsellors, and not counselling per se important knowledge for mediators.[131]

Non-directive counselling and mediation have many similarities. For example, one of the goals of non-directive counselling is to try to enable the clients to make their own decisions and to resolve their own problems. Generally, non-directive counsellors do not try to change people or to make decisions for them:

> I hate that word 'correct' - because you can't put it right. They've got to put it right for themselves. ... It is the same with counselling. When a family comes to me for counselling, I can't put it right for them. I can only enable them to put it right for themselves. Because you are not treating like a doctor. You are not dishing out potions and pills and saying this will make it better. (out-of-court conciliator)

Non-directive counsellors also focus on the problems their client's present and often seek to improve communication between couples or within families.[132] As we saw in chapter 9 however, the fact that two processes have similarities does not mean that they are the same. When the practitioners were ranking this subject, they often elucidated the differences between mediation and counselling in order to explain their answers. A further look at some of their comments may help to clarify the situation.

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130 The lawyers were surveyed by questionnaire and were thus less able than were the mediators to qualify their answers. In addition, the mediators were asked about the importance of interviewing, communication, and listening skills independently of the importance of counselling skills. The lawyers were only offered 'counselling' to consider.

131 For other possible explanations, see: L. Neilson (1990).

132 I. Goldenberg and H. Goldenberg (1985): 105; J. Ross (1985): 150.

The practitioners pointed out that counselling and mediation are different in focus and emphasis. They suggested that, while in mediation the identification, understanding, and acknowledgement of the emotions underlying the dispute and the relationships between the participants may be important, the focus is on resolving the concrete rather than the background, emotional or relationship issues. They believed that counsellors focus on resolving relational and emotional problems generated by events past and present, whereas mediators focus on resolving concrete disputes occurring in the present, for use in the future, for example: [133]

> Counselling is feeling centered. [You are] exploring feelings and how the client has arrived at where they are. And you try to get the client to look at how they got there and what they can do about it. Mediation is very specific. .. It is about children, not about the marital situation. It is narrowly defined. .. You must be aware of the feelings but that isn't what you are there for. You are trying to negotiate. In counselling it [negotiation] may come up but mediation is more about negotiation. It is much more here and now. (out-of-court conciliator)

> A conciliator is not a counsellor. I've found that in my experience. No, I don't think they need counselling skills but maybe that is my view of counselling. It [mediation] is much more get up and go, and focussing on the actual [conflict]. It is hard to do - not to be thinking about people's backgrounds and what they bring. We are just looking at what they bring for a couple of hours, so I don't think counselling is essential, no. (out-of-court conciliator)

> The disadvantage of counsellors and therapists is that mediation is not about therapy. It may have a therapeutic spin off, but it is to sort out, at the end of the day, very practical issues, about access and other problem areas. (out-of-court conciliator)

They also pointed out that counselling is normally a longer and deeper process:

> If we are going to see this as something for people who need a little help but have the capacity to sort it out themselves - not dealing with people who are so neurotic or ill that it will take months to shift their ground - you can call it counselling skills, but it is not counselling. Counselling is trying to change something which has got stuck. .. They [mediation clients] almost have got there. We just trigger it - help them look at it in another way. So it is sort of a counselling skill but I don't think we ought to pretend this is counselling. (out-of-court service consultant)

> I am a counsellor and I have to turn off my counselling, because

133 See also: J. Blades (1984): 83; T. Fisher (1986a): 17; J. Folberg (1985) 415; A. Milne (1983): 15; C. Moore (1988): 259, (1986): 129; L. Parkinson (1985c): 218.

> counselling is an ongoing process that could last six months, could last one year, whereas in mediation we get them one, two, sometimes three sessions.[134] And you are not going into family background, into counselling. You are helping them to communicate and mediate with their partner. It is like negotiating a contract, although you will have some feelings from them. Your job is not really - although you do allow a bit a feeling - is not to go into the amount of feeling you would in counselling. (out-of-court conciliator)

> It is better to take someone who is the right material and train them, than to take someone who is a counsellor because they are not thinking in the same way as a mediator. .. Counselling is done over a period of time. [The counsellor gets] to know them. (out-of-court conciliator)

Related to the difference in duration is the issue of professional dependency, as suggested in the last quotation:

> I think in doing conciliation it is sometimes difficult to bite your tongue and not start counselling, particularly when it hits you in the face. .. And [not to] advise them how they can deal with it better and this is where you get into the difficult area .. you do have to be careful not to talk too long and to shut up. (out-of-court conciliator)

> (*Do you think it is appropriate to mediate if the mediator has previously counselled both disputants?*)[135] That is difficult too. Because you then have two alliances. The workers could split. The workers [co-mediators] need to be modelling a partnership. It could be possible if you started [mediation] jointly and then the parties went out separately for a [counselling] session, and then came back in, but even that is possibly skewed. (out-of-court conciliator)

> #1: [The mediator] need[s] to have to be fresh, independent, and not associated with any of the inner psychic turmoils any [of the disputants have]. #2: In counselling there has to be an alliance between the counsellor and that person and if you move into conciliation that alliance becomes visible to everyone in the room, including the co-conciliator. (three in-court conciliators) [136]

As the practitioners have stated, mediators and counsellors form somewhat different relationships with their clients. In counselling the relationship has more depth and the client becomes more reliant.[137] The clients rely on the counsellor for advise and support. To a certain extent the client gives up, or requests from the counsellor that he

134 This service dealt primarily with access.

135 The mediators' responses to this question will be discussed in a separate paper. The quotation has been included here because it illustrates this practitioners' perception of one of the differences between counselling and mediation.

136 Like the quotation before it, these practitioners were responding to my enquiries about combining mediation and counselling.

137 See also, for example: M Oddie (1990): 70, 73.

or she exercise a certain amount of power. The mediator, however, encourages the disputants to look to each other for the solution to their problems. We looked at the issue of disputant autonomy in chapters 4 and 5. There we saw that most of the practitioners thought it the role of the mediator to encourage disputant independence and autonomy, not to encourage professional dependence. This difference in roles was one of the reasons that the mediators failed to endorse the importance of mediators learning counselling skills. Perhaps the difference also helps to explain the inability of researchers to establish connections between mediation and positive, long-term changes in disputants' relationships.[138] Perhaps relational changes of a long-term nature are best left to counsellors and therapists. Perhaps Greater London's family lawyers gave counselling a higher rating than did the mediators because they did not understand the differences between counselling and mediation.

As we have seen, the general consensus among the practising mediators was that mediators need many of the personal characteristics that counsellors need and some of the same skills, but that they do not need to know how to do counselling. This perspective affected the practitioners views of who should be allowed entry into mediation training[139] and their views on the amount of time which should be devoted to counselling in the training programmes:

> Counselling is all about feeling. You have to be able to draw the line. So somebody without counselling skills could be just as valuable. (*Do mediators need to learn some counselling skills?*) Yes, it would be helpful. But I don't think you need the training a full blown counsellor would get. (out-of-court conciliator)

The practitioners' comments and ranking of this subject as a whole suggest that, although some aspects of counselling might be emended for use in mediation,

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138 See, for example: Department of Justice (1988a): 38 (1988b): 293; R. Emery and M. Wyer (1987): 11; K. Kressel, F. DeFreitas, et. al. (1989): 66-67; E. Lyon, N. Thoennes, et. al. (1985): 22; Newcastle Report (1988): 230-40; J. Pearson and N. Thoennes (1988a): 82, (1988b): 443-4. But see also (for some limited improvement): H. Irving, M. Benjamin, et. al. (1981): 60; J. Kelly (1989): 81; J. Waldron, C. Roth, et. al. (1984): 14.

139 See chapter 9.

counselling skills per se were not terribly important. The practitioners did suggest, however, the need for mediators gain some familiarity with counselling to enable them to make appropriate and effective referrals:

> I was going to say 'useful' but now I am going to say 'essential' because, although it is not what we do here, so many people who come require counselling and I think we have to know quite a lot about counselling in order to refer them to the appropriate agency at the right time. (out-of-court conciliator)

In addition many thought it important to include a section on counselling in the mediator's training in order to illustrate, for newcomers, the differences between the two processes:

> I don't think counselling skills can do any harm, if by counselling skills we mean the capacity to listen relevantly, and, yes, I don't think mediators need to be counsellors. They don't need it in a course. I think, perhaps it is important to include [a section on counselling] to emphasize the differences between counselling and mediation - to have a knowledge of the different types of intervention. (out-of-court conciliator)

Marital and Sexual Problems

The practitioners did not think this area important because of the subject's focus on relationships past. We shall remember, from our earlier discussions, that most practitioners did not think it part of the mediator's role to provide reconciliation counselling.

Behaviour Modification

This subject was also given low priority.[140] This is not surprising, given the goals of mediation discussed in chapter 4. As one of the practitioners stated:

> God forbid that they should start using that in conciliation! They should know it exists and know that certain people benefit from it and certain people don't, but it is not their job to practice it. (out-of-court

140 J. Bercovitch (1984): 54, found that the family therapists in England, who included dispute resolution in their therapy practises, gave this subject high priority. I have no explanation for the difference, other than to suggest the possibility that those who practise family or divorce mediation as a sideline or as part of another process may view mediation quite differently from those who practice mediation as a separate endeavor. Alternatively, perhaps the different results simply reflect the ebbs and flows of social work fashion.

conciliator)

As with all the other subjects, however, certain aspects of behavioural modification can, on a superficial level, be quite relevant to mediation.[141] For example:

> Yes, yes I do. You can modify behaviour - immediate behaviour - that is blocking the agreement. [For example] causing the nuisance on the doorstep, you can help them modify that by looking at different arrangements for access. But that is the behaviour modification we would be looking at. I'm not talking about long-term behaviour modification. (out-of-court conciliator)

> Very helpful. Not in the sense of doing therapy, but in terms of short-term work. For example, by encouraging good behaviour, by flattering them, telling them what a great job they are doing, putting them in a position where they feel they have to continue doing a great job. To that extent: positive reinforcement and short-term behavioural modification is important. (in-court conciliator)

> Useful. You can teach that in a variety of ways, right through social learning theory. You can teach about modelling before going much into the theory. I think an understanding of modelling is important. (*What is modelling?*) Displaying the right kind of behaviour in the hopes the person will imitate it. .. Trying to show someone how to communicate clearly or to avoid increasing tension, how to defuse tension. For example, when you phone up each other, you only talk about your child, you don't talk about the money, the furniture. (out-of-court conciliator)

> I'm not sure what you mean - whether you mean techniques to get people to change their behaviour or whether you mean assisting people to try to think of approaching something differently. (*I mean techniques to change behaviour.*) No. Once again, you are out of the mediator role. .. If you are getting into that, they should be outside the mediation room and hopefully somewhere else. .. To me, behavioural techniques are if someone has an obsession and you are trying to get them to change their behaviour, whereas if someone is not greeting his wife, then perhaps it would be useful to suggest to him - .. 'how would you feel?'. .. I think it is much more negotiation skills we are using. (out-of-court conciliator)

On a very simple level almost everything the mediator does is a form of behaviour modification. Mediators are trying to get parents or partners to change the ways they deal with and interact about conflict. Furthermore, it appears that some of tools used by behaviour modification therapists to improve or modify communication patterns could be quite helpful in mediation, provided those tools are removed from their therapeutic and theoretical contexts and adapted for dispute resolution purposes.

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141 See, for example: K. Kressel (1985): 102; R. E. Walton (1969): 122.

Again, we encounter the importance of being clear about what we are talking about. The fact that one might be able to use some of the tools from this discipline in the mediation process does not mean behavioral modification theory is fundamental or even particularly important to mediation.[142]

Psychotherapy

Like all of the therapeutic perspectives, psychotherapy was given low priority. The family lawyers agreed with the practitioners about the lack of importance of this subject. Generally, most mediation practitioners suggested that beginning mediators need only acquire enough understanding of the concepts and techniques used by psychotherapists to make appropriate referrals.

Discussion, Summary and Conclusions

The practising mediators emphasized the need for mediators to acquire substantive knowledge in the following areas:

1) the psychological effects of divorce on family members including: an understanding of the emotional components of the divorce process; exposure to the literature and research on the psychological effects of divorce and family reorganization on children and their parents; an understanding of the prevalence and implications of family violence; and exposure to the literature and research on the implications of various types of child arrangements for children and their families. Mediators who would mediate financial and property issues would also need to understand the financial consequences of family reorganization. Knowledge of the effects of divorce and family reorganization on family members was considered essential or very helpful by 94.1% of the practitioners. The family lawyers did not endorse this subject

2) The practitioners also stressed the importance of positive connotation and

142 For a contrary view see: I. Falloon: 101 wherein the author describes similarities between mediation and behavioural family therapy and claims at page 119 that divorce mediation is derived from it. For a criticism of this type of analysis, see chapter 9.

reframing but we saw that there were some differences of opinion about the meaning of these terms. Most practitioners were identifying dispute resolution rather than therapeutic techniques. They wanted mediators to be taught how to rephrase or to respond to disputants' comments in ways conducive to helping the disputants resolve their own disputes. Ninety four per cent of the practitioners stressed the importance of this subject.

3) The need for new mediators to learn about children's psychological development was highly countenanced by 84.2% of the practitioners. In particular the practitioners wanted mediators to be exposed to and understand the literature and research on the ranges of the normal child's responses to stress and family reorganization and how these vary by age. They also wanted new mediators to understand the effects of a child's age and maturity on the appropriateness of various types of visiting arrangements. They did not suggest that mediators acquire the level of knowledge needed by those who would attempt to treat problems falling outside the normal ranges of child responses. The knowledge they identified was specific to the divorce and mediation processes.

4) Eighty-one percent of the practitioners gave high priority to teaching mediators techniques of communicating with children. When we omitted the comments of those who did not include children in mediation, the level of endorsement was even higher. Very few of the practitioners offered additional comments. Those who did comment suggested the need for mediators, particularly those including children, to learn age-appropriate interviewing styles and to keep abreast of children's current fads and interests.

5) Non-verbal communication, or body language, was highly endorsed by 79.6% of the practitioners. Again, the knowledge the practitioners identified was general and procedural, rather than substantive and technical. The practitioners did not want mediators to learn how to make professional assessments, but they did want

mediators to be taught the importance of paying close attention to the disputants' unspoken conflicts in order to ensure full coverage of the conflict.

6) The majority of the practitioners (76.8%) also gave high priority to the need for mediators to recognize the potential for reconciliation. Again, they spoke about process, however, and not about substantive knowledge. They thought it important for mediators to explore the possibility of reconciliation with the disputants at the beginning of the mediation process. If a real possibility existed they considered mediation inappropriate and suggested referral. They also wanted mediators to understand the importance of keeping in mind the different stages the disputants had reached in their emotional divorce process, in order to be able to understand and deal with negotiation imbalances.

6) Seventy-three percent of the practitioners considered an understanding of family interaction important. When we examined the practitioners' comments, we discovered that they wanted mediators to understand how families work in practice, that they were adverse to theoretical models, and particularly to the application of any single model. They also did not think mediators need to acquire therapeutic knowledge, except for referral purposes. Most of the knowledge identified could be derived from the social work or behavioural sciences, but it was not exclusive to them; for example: expertise in conducting and balancing group meetings; in detecting and balancing differences in negotiating power; in understanding and considering the different roles of family members; in getting the parents to unlink their spousal from their parental roles; in including (actually or figuratively) in the resolution process all those with significant role to play in the dispute and its resolution; in having the disputants consider the interests of and relationships between all close family members during the mediation process. We found that the practitioners continued to stress procedural, rather than substantive, and practical, rather than theoretical knowledge.

7) Seventy-two percent of the practitioners gave high priority to ethnic and

cultural knowledge. The practitioners suggested that mediators serving a multitude of peoples should learn about the different types of family structures, the roles and positions of women in marriage and divorce, the social pressures concerning divorce, the child-rearing practices, the religious practices, the body languages, the legal expectations with respect to child custody and property ownership, and the different negotiating styles of the different ethnic, cultural and religious groups of people. Others suggested that this knowledge could best be acquired during mediation as long as mediators were first trained to be aware and sensitive to ethnic and cultural considerations.

8) Correction of communication problems was also given fairly high priority, but the goal was to improve the family's communication during the dispute resolution process. Most practitioners did not think mediators should be seeking long term, therapeutic change. It was also clear, from the practitioners responses to a variety of questions on communication, that the practitioners wanted mediators to be taught practical communication tools not therapeutic ones, and that most suggested that mediators be taught practical tools and not academic, theoretical training in this area.

Training in the recognition of family-role problems, recognition of child behaviour problems, mental illness, and communication theory gained only moderate to low levels of endorsement. When the practitioners discussed these subjects they tended to emphasize the differences between mediation and therapy, and the importance of personal or professional experience as opposed to theoretical knowledge. Or they felt mediators only need enough education from these areas to understand when mediation was not feasible and to make appropriate referrals. The majority of the practitioners failed to assign high priority to the need for mediators to have training in family systems theory, counselling skills, marital and sexual problems, behaviour modification, psychotherapy, childhood mental and physical disabilities, role and game playing, and treatment of family dysfunction or child behavioural problems. They enunciated their concerns about family systems theory's relevance to the divorce process and to

mediation. In particular they were concerned about the theory's focus on the past or changing relationships, about its narrowness, and about the shift to expert status and power accompanying its application. Only a minority endorsed the therapeutic use of family systems theory in mediation. Others endorsed its use as a conceptual aid. Even those who did not think the theory important, however, thought mediators should have some exposure to family systems theory in order to enable them to make appropriate referrals.

The practitioners explained their failure to endorse counselling in terms of their perceptions of the differences between the mediation and counselling processes. While they did think it important for mediators to acquire some of the skills of counsellors - for example, active listening and interviewing skills, and the abilities to establish rapport, portray empathy and respect for the individual - they did not think it important for mediators to know how to do counselling per se. In keeping with their focus on dispute or conflict resolution, the practising mediators failed to endorse all of the therapeutic and treatment categories. With the exception of the need for mediators to acquire counselling skills, the family lawyers gave all of the mental-health subjects lower ratings, presumably because of their own lack of exposure to and expertise in these areas. For the most part the mediator's suggestions were in accordance with the mediation literature and with the goals and parameters of mediation the practitioners identified in chapters 4, 5, and 6. They were also based on considerable educational and occupational experience.

The practising mediators' suggestions differed from those in the mediation literature in two areas, however. The mediators failed to endorse the importance of mediators being taught counselling and family systems theory. Both receive higher priority in the literature. The mediators suggested the importance of teaching mediators to use many of the same skills used by counsellors, for example: establishing rapport, active listening, interviewing skills; but they did not think that mediators needed to

learn how to do counselling. Perhaps the practising mediators' views appear to be differ from the views expressed in the mediation literature because these elements of the issue have not been separated in the literature. There appears to be a similar confusion surrounding the importance to mediators of family systems theory. The use of the theory as a conceptual aid is being confused with its application. We found that while certain elements of the theory could help mediators if used merely as a conceptual aid, that the theory's application appeared to be inimical to mediation. The practising mediators questioned the relevance of the theory to family breakdown and reformation and suggested instead the need for mediators to acquire a practical understanding of how families operate, particularly in periods of crisis and family reorganization.

Throughout the practising mediators' comments we find a number of common threads. Several of these were first identified in chapter 11. The first was that most of the practitioners wanted mediators to be given tools to help people resolve their own disputes. They did not think it appropriate to attempt to teach mediators how to treat or therapeutically change people or their families. The second was that there was a general consensus, even among most of those who did think some aspects of counselling or therapy appropriate, that mediators should not be indoctrinated in or taught any one particular therapeutic model. Rather, the practising mediators suggested that new mediators learn enough about the various therapeutic methods to be able to make appropriate referrals.

The third thread is that the mediators' emphasis was on the normal rather than on the abnormal or dysfunctional. For example, the practitioners identified the need for mediators to acquire substantive knowledge in the following areas: the normal emotional stages of the divorce process; the literature and research on the normal short and long term psychological effects of divorce and family reorganization on children, their parents, and newly reconstituted families; the literature and research on the advantages and disadvantages of various arrangements for the post divorce care of children,

including an understanding of the relevance of the child's age and stage of development. It is important to recognize here that the practitioners have indicated areas of substantive knowledge that are different from that needed by social workers, therapists and psychologists in one very important aspect. The emphasis is on understanding the normal, not the abnormal or dysfunctional. Most of the practitioners would leave the latter to the domain of the social-work and mental-health practitioners.

The fourth was the emphasis on procedural rather than theoretical or academic knowledge. With the exception of knowledge about normal reactions to divorce and family reorganization and the ethnic or cultural knowledge, the practitioners tended to emphasize matters relating to the mediation process. As a general rule they wanted mediators to be taught procedural tools rather than theories and substantive knowledge. This is entirely in keeping with the roles of the mediator and the goals of the mediation process that the practitioners identified in chapters 4, 5 and 6. There we saw that while the practitioners said that mediators need to be experts of the mediation process and facilitators of the family's dispute resolution process, they felt it inappropriate for the mediator to assume expert status and control over substantive matters.[143]

Finally, we notice the limitations in the knowledge proposed and the fact that much of it is not exclusive to any of the social work, counselling, therapeutic or social science disciplines. Much of it can be acquired elsewhere, for example, from the dispute and conflict resolution, the sociological and anthropological literature. The types and parameters of the knowledge do not appear to support the claims of some that one must be a social worker, counsellor, or family therapist to be trainable as a mediator. In fact it would appear that many practitioners thought most of the knowledge of those disciplines unimportant or not irrelevant to mediation.[144] This does not mean that

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143 Whether or not mediators having these perspectives turn those perspectives into action during mediation sessions is another matter. There is some evidence to suggest that in spite of their rhetoric, mediators can be very directive: D. Greatbatch and R. Dingwall (1990): 53-64. See also chapter 5.

144 See also chapter 9.

people with these backgrounds cannot be assets to mediation, however, provided they are able to make the necessary changes in their roles. We have seen throughout our discussions that one can derive dispute resolution tools from a variety of disciplines. All those with 'professional' experience working with families and their problems will no doubt have an advantage as beginning mediators.[145] The practitioners' comments simply suggest that these backgrounds are not fundamental or basic to mediation.

Many of Greater London's practitioners appeared to be involved in a trans-disciplinary process. They appeared to be removing, changing, adapting and amending pieces of information or knowledge from their first disciplines to accommodate their new roles as mediators. We first encountered this problem in chapter 11. Perhaps the acquisition of mediation knowledge and skills could be hastened, and much of the disciplinary confusion avoided, if beginning mediators were able to skip this process, if beginning mediators were taught mediation tools rather than social work, counselling, therapy or legal ones.

In chapter 13 we shall examine the practitioners' views on the need for mediators to acquire substantive legal and financial knowledge. While the practising mediators were well versed in social-work, mental-health and counselling knowledge and skills, and thus able, in this chapter, to base their opinions on considerable expertise, they lacked educational and practical exposure to law and finance. Thus in chapter 13 we shall begin to place more emphasis on the views of the family lawyers.

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145 See chapter 9, however.

CHAPTER 13

The Mediator's Need For Legal And Financial Education

Introduction

In chapter 12 we examined the practising mediators' and lawyers' views of the need for mediators to acquire knowledge from the mental-health and social-work disciplines. We found that the knowledge suggested was firmly connected to the goals, parameters, and needs of the mediation process. For the most part, the mediators' comments were also in accordance with the mediation literature. Here we shall complete our examination of the practitioners' suggestions for the substantive content of mediation training by looking at the practitioners' opinions about the need for mediators to acquire substantive knowledge from the legal and financial disciplines.

In chapter 12 we kept in mind the fact that the mediators appeared to have educational and professional expertise from the social-work, counselling, and mental health disciplines upon which to base their recommendations. We must take into account a very different situation here. In chapter 2 we learned that only 8.3% of the practising mediators had primary occupations connected to the practice of law,[1] and, at the time of the survey, few claimed appreciable amounts of legal or financial education.[2] In chapters 2, 3 and 7 we learned that only eleven of the mediators provided financial and property mediation on a regular basis. Thus the majority had little education or occupational experience upon which to base their views. As we explore the practising mediators' educational suggestions, we must also need to keep in mind our finding in chapter 7 that over one-quarter of the mediators were either

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1 One legal executive, one law teacher, two barristers and five practising solicitors.

2 See chapter 2.

opposed to financial and property mediation or thought the service should be provided by family lawyers. A substantial number considered only child mediation when they addressed educational issues. We shall find that, together, these factors had an inhibiting affect on the legal and financial knowledge recommended. We must, therefore, accept the mediators' proposals discussed in this chapter with caution.

We shall find it necessary to modify the mediators' proposals by giving weight to the suggestions of the family lawyers. The latter had more experience, education and training in these matters. This study anticipated the mediators' lack of legal and financial experience and education. Thus family lawyers practising in Greater London were surveyed on many of the same issues in order to balance the mediators' views. Although it appears that some of the family lawyers may not have fully understood the role of the mediator,[3] it was clear that they did have an abundance of education and professional experience upon which to base their conclusions and thus, perhaps, a superior understanding of the substantive knowledge required.[4] It is important not to discount the probative value of experience. We shall recall that in chapter 2 many of Greater London's experienced mediators commented, without solicitation, that they had discovered only with experience the amount of knowledge and expertize required to practice family mediation.

Table 11-1 informs us that the mediation practitioners gave the highest priority among the legal subjects to the need for mediators to learn custody and access law. This was not surprising as most of the mediators mediated only legal disputes over the care of children.[5] They therefore placed an emphasis on the importance of mediators acquiring legal knowledge connected to children and discounted the importance of legal knowledge connected to financial and property matters. The lawyers, however, emphasized the importance of latter. We shall recall, from chapter 2, that the lawyers were concerned about what they perceived to be a lack

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3 See chapter 11.

4 See chapter 1 and L. Neilson (1990).

5 See chapters 3 and 7 and Appendix A-1.

of education and training of family mediators.[6] We also learned that there appeared to be a sound basis for the lawyers' concerns. We shall encounter further corroboration of those concerns here. Generally we shall find that, while the mediators could give some general guidance on the depth and usage of legal knowledge in the mediation process, they did not understand the substantive issues involved in global mediation and thus were not able to identify the education and training needed to perform it. As we look at the concepts of confidentiality and privilege, we shall discover that the mediators lacked an understanding of the application of law to their own practices. They were in a state of uncertainty and confusion and thus inconsistent in the scope of confidentiality offered to disputants. The failure of the mediators to suggest the need for mediators to acquire substantive knowledge from the legal and financial areas will not be convincing. Rather, we shall find that the practitioners' comments exhibit uncertainty and suggest the need for extensive retraining of mediators, particularly those wishing to engage in global mediation.

The numbers and percentages in **Table 11-1** give us an inkling of the relative weights that lawyers and mediation practitioners attached to the importance of mediators learning legal and financial subjects but these weights, alone, do not tell us very much. In order to fully appreciate the practitioners' perspectives, we must examine the depth of knowledge suggested, and the explanations the practitioners gave for their views. We turn now, therefore, to the practitioners' comments.

The Mediator And Child Custody And Access Law[7]

Before we discuss the practising mediators' comments about the need for beginning mediators to acquire knowledge of child law, a few words of explanation are in order. The terms 'custody and access law' as they have been used here should not be interpreted narrowly. The terms were not intended to exclude, for example, the law with respect to disputes over children in

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6 See also: L. Neilson (1990).

7 We shall not discuss every subject in detail but shall limit our discussions to subjects requiring further explanation or particularly illustrative of the practitioners' opinions.

custodianship or domestic cases. Rather the intention was to include all family law (statutory or judicial) dealing with the family's future care and control of their own children, including, for example, disputes between family members and guardians, disputes between fathers unmarried to mothers and mothers, and wardship disputes not involving the state. The need for mediators to acquire an understanding of the law with respect to the state's protection of children, and also adoption law were discussed with the mediators separately.

With the coming into force of the Children Act 1989 in October of 1991,[8] and particularly with the coming into force of sections 1, 3, 8; 'custody', 'access', and 'care and control' orders will be replaced by 'residence', 'prohibited steps', specific issues', and 'contact' orders; custodianship will be abolished; and consideration of parental 'rights', to the extent those previously existed,[9] will give way to consideration of parental 'responsibilities'.[10] These changes reflect a changing emphasis in family law in England. Presumably the practitioners' opinions about the need for mediators to acquire knowledge of child law will endure these changes.

The first thing we notice about the practitioners' rankings of this subject is the level of endorsement. Fully 87.1% of the mediation and 92.7% of legal practitioners considered mediator education in child law either essential or very helpful. None classified the subject as 'not very helpful' or 'not relevant'. We might contrast this level of endorsement with the mediators' own education. During the course of the interviews nine mediators, without solicitation, said that they wished they had more education in this subject.[11] In chapter 2 we saw that only 21.2% claimed intermediate to high levels of formal education in child custody and access law. The remainder indicated only limited formal education, including 20% who claimed none. These responses indicate either that the practitioners did not tend to minimize

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8 i.e. A. Bainham (1990): 2.

9 See i.e., S. Cretney (1984): 293-6; Re S (Minors: Access Appeal) as reported in Family Law 20 (1990): 336-7, but see: Re K (A Minor) as reported in Family Law, (1990): 256-7.

10 The concept of parental 'rights' is preserved within the Act's definition of 'parental responsibilities', in section 3 (1), but within the 'responsibility' definition and on even footing with the concept of 'parental duties'.

11 See Appendix A-5.

the importance of education they, themselves, lacked, or that they attached great importance indeed to the need for mediators to acquire knowledge of this subject. The practitioners' impressions of the importance of this subject are in accordance with the mediation literature.[12]

Why had the practising mediators found this subject important, and what depth of knowledge did they think necessary? Those mediators who believed custody and access law knowledge essential gave basically two reasons for this view: that the knowledge was needed to enable the mediator to keep the disputants' discussions within the broad parameters of legal acceptability, and so that the mediator could convey an air of competence and confidence:

> The conciliator needs a clear understanding of custody, both as to the law and its general application,[13] in order to be able to conciliate with the parties. ... A clear understanding of that is most essential. (out-of-court conciliator)
>
> I think it is essential. It makes me realize my own deficiencies, but I would have thought if you didn't understand the legal framework surrounding these issues, you would be being unrealistic about the services you can offer. (out-of-court conciliator)
>
> No, essential. If you are going to talk about custody and access issues you really ought to know what the courts can and cannot do. Because if you don't, the clients may come up with wild suggestions the courts would never accept or which can't be put into legal practice. (in-court conciliator)
>
> There must be a sufficient informational input [into the mediator's education]. [A mediator] must be at ease with the legal background so [he or she] gives an air of knowledge and confidence, because this is what people want. (advisor to an out-of-court mediation service)

It is clear, from the practitioners' comments, that they were recommending that new mediators be taught child law, not in order to enable them to tell disputants what to do, or to advise them, but in order to enable them to keep discussions focussed on realistic possibilities and to exude an air of competence. This proposed usage of substantive knowledge is entirely consistent with the goals of mediation and with the role of the mediator as the practising mediators described them in chapters 4, 5, 6, 8 and 9.

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12 See, for example: M. Baker-Jackson, K. Bergman et. al. (1985): 67; C. Cramer and R. Schoeneman (1985): 33; H. Edwards: 683; R. Emery and M. Wyer (1987): 179; Family Mediation Canada (1986), (1990b); J. Graham Hall (1978): 12; S. Grebe (1988): 16; J. Haynes (1984): 502; E. Koopman (1985a): 125; J. Lemmon (1985): 19; C. Moore (1983): 83; L. Parkinson (1987a); M. Robinson (1982); S. Steir and N. Hamilton (1984); C. Yates (1982).

13 This comment would suggest the need for mediators to not only understand the law but also the implications and consequences of legal agreements and court orders in practice.

The mediators who qualified their answers or chose the 'very helpful' rather than 'essential' category gave the same reasons for inclusion, but exhibited an apprehension about their own lack of knowledge:

> That is my weakest point in training. It is helpful to have. The knowledge is important but if you haven't got full knowledge, you need to know who has and send them [the disputants] there. I wish I had more knowledge. [*Should one of the two conciliators have that knowledge?*[14]] Yes. Between the two they would need a fair amount of knowledge. Very helpful. (out-of-court conciliator)

The mediators who only ranked the knowledge 'helpful' a) did not think a great deal of depth necessary:

> One would be handicapped if one didn't know the difference between custody, care and control, reasonable access, defined access or ... [you need] the basics but not the technical [knowledge]. Helpful rather than essential. (two out-of-court conciliators);

b) were worried about stepping from mediation into the practice of law; or c) thought it important to emphasize the fact that the knowledge would not be needed by those practitioners who limited their practices of mediation to access disputes, for example:

> #1 and #2: Helpful. #2: I would say helpful because no way should you ever think you know the law and start giving advice. It is helpful to know enough - to know when to say, 'I think you ought to check with your lawyer on that'. If you know too much you could be tempted to act as a lawyer. .. [You need enough knowledge] to say: 'Check that out' [or] 'Are you sure you've got the hang of that properly?' [or] 'It doesn't sound as if you've got the hang of that', but not to set yourself up as the expert.[15] You need to know about it but, if you didn't know, you could still do your stuff about access. (Two out-of-court conciliators) [16]

Thus the 'essential', 'very helpful', 'helpful', and 'not relevant' divisions concealed a general consensus among mediation practitioners, as follows:

> Essential. They [mediators] don't need to have the knowledge a lawyer would need but they need to be well grounded in the sense of the law in those areas. (out-of-court conciliator)

> Some grasp of that is useful. Given it takes 6-7 years to train a lawyer - to train them to that extent is firstly not feasible and secondly probably not relevant. But

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14 This practitioner usually worked with a co-worker.

15 For discussion of the differences between the role of the mediator and that of the expert, see chapter 5.

16 a) The practitioner is referring to disputes over access or visitation, after custody has been settled.

b) For further discussion of the differences between the role of the mediator and that of the family lawyer, see chapters 7 and 9; and the general discussions about the role of the mediator in chapters 4 and 5.

> you have to have a grasp of the legal basics. That is what comes through and what people expect. If you have no awareness then, apart from anything else, the client's lack of confidence will be unhelpful to the mediation process. So a basic grounding is essential but not extensive training. (out-of-court conciliator)

We shall discuss the different levels of legal education needed by family lawyers and mediators at the end of this chapter. For the time being we should note that, while the number of mediators endorsing a subject or failing to do so reflects the relative importances that the practitioners attached to it, when consideration is given to the reasons the practitioners gave for their views, the differences of opinion were sometimes not as meaningful as they first appeared. Some of those who considered certain portions of a subject important classified the subject 'essential'; others classified it 'helpful' because only certain aspects of it were thought to be important. While most of the practitioners gave consideration both to importance and breadth when ranking subjects, others did not. The practitioners' comments suggest the need, in future, for researchers, particularly those surveying by questionnaire, to separate these two aspects of the question.

Most of the practising mediators thought it essential to include custody and access or child law in the mediator's training, but they did not think that all of the technical aspects of child law relevant. The mediators were careful to point out that the depth of knowledge needed by family lawyers was not required. With the coming into force of the Children Act 1989, we can expect changes in legal terminology, more emphasis on the rights of families to resolve their own problems, more emphasis on the rights and opinions of children, and a shift in emphasis from parental rights to parental responsibilities. These changes will mean that, to the extent that mediators require knowledge of child law, they will also need an understanding of these changes. Perhaps a general understanding of these changes will suffice. The basic matters that parents and others having responsibility for children must consider: the decisions they must make concerning the care of their children upon the family's separation and reorganization, and the emotional turmoil most people will feel when deciding these matters, will not change. Those having parental responsibility must still decide where their children will live, how often they will have contact with the non-residential parent or family member, and

who will make what decisions on the children's behalf.

The Mediator And Divorce Law

As we see in **Table 11-1**, the majority of the practising mediators thought it important that beginning mediators gain an understanding of divorce law. The subject was not, however, seen to be as important as child law. While Greater London's family lawyers gave the subject a somewhat higher level of endorsement than did the mediators, in essence the lawyers and mediators were in agreement about the importance of this subject. Mediation trainers and teachers in academic institutions in the United States have stressed the importance of this subject.[17] The reasons Greater London's mediators gave for suggesting the need to train mediators in this area were essentially the same as those they gave for the need to teach mediators child law: to enable the mediators to keep discussions within the broad parameters of legal acceptability, and to project an air of competence.

Again, however, the depth of knowledge identified was quite different from what one would expect of a family lawyer:

> Yes, but just a general understanding of the procedure, because if they come to you early on, you've got to be able to tell them where to go. People want to know what the grounds are. [Mediators need] a general overview, not terribly deeply, but you've got to know where to send people off to. (out-of-court conciliator)

> Yes, but not by any means as high [a level] as custody and access law because that [obtaining the divorce] is more the job of the solicitor. But the conciliator ought to have at least some understanding of what will lead to divorce in law. The conciliator's emphasis is helping the parents work out arrangements about the children. An overview would be helpful, rather than intricate knowledge. (out-of-court conciliator)

> #1 and #2: Helpful. #1: To picture what they are going through and that if they don't decide the judge will. ... Knowing what it is like in the court. The picture is essential. Not to tell them what the process is, the lawyers tell them that, but for us to know what the process is so we know what they are talking about. #2: That is more than just helpful. #1: Yes, but more from the point of view of knowing what they are talking about, because if they start talking and we don't know what they are talking about, it ruins our credibility. (Two out-of-court conciliators)

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17 E. Koopman (1985a): 118.

From the practitioners' comments we can surmise that they thought mediators need to gain a basic understanding of the various stages of the legal divorce process; a general, but not technical, understanding of the grounds of divorce; an understanding of legal terminology; and an appreciation of the court environment.

The Mediator And Confidentiality and Privilege[18]

Very few of the practising mediators understood either the basic legal concepts of confidentiality and privilege or their applications to mediation. There is a developing body of law in this area and the topic has already been given some prominence in the mediation literature.[19] The practising mediators not only lacked an understanding of the law, they were

18 The questionnaire survey of the family lawyers did not include a question on this topic so our discussions will be limited to the views of the practising mediators.

19 a) For information on the situation in England, see for example: Clapham, B. (1990): 274-5; N. Fricker, et. al. (1989): 256; A. James and K. Wilson (1988): 13-14; C. T. Latham (1986); H. Landerkin (1990): 4-5; A. H. Manchester and J. M. Whetton (1974): 382; J. McCrory (1988) and the cases cited therein; National Family Conciliation Council, Code (1984), (1986): s.4; D. Parker and L. Parkinson (1985); J. Pugsley, J. Cole, et. al. (1986): 165; Newcastle Report (1989): 14, 60-1; M. Roberts (1988): 95-7; C. Sacks (1987): 29-30. See also: Children Act 1989, s.48(1), 50(3); RSC Ord. 90, r. 3 (3)(4)(6); B v M as reported in Family Law (1990): 346-8; D v NSPCC [1977] 1 All ER 589; Gaskin v Liverpool City Council [1980] 1 WLR 1549; McTaggart v McTaggart [1949] P 49; Pais v Pais [1970] 3 All ER 491; R v Hampshire County Council ex parte K and Another, Family Law Vol. 20 (1990): 253-4; R v Sunderland Juvenile Court ex parte G [1988] 2 FLR 40; Re D (Infants) [1970] 1 WLR 599; Re G. (A Minor) (Welfare Officer's Report) Family Law (1990): 475; Re M (Minors) (Confidential Documents) [1987] 1 FLR 46; Re M (A Minor) (Discovery: Wardship Proceedings) Family Law (1990): 259-60; Re P (Minors) Family Law (1990): 81-2; Theodoropoulas v Theodoropoulas [1964] P 311.

b) On the situation in the United States and Canada, see, for example: American Bar Association (1985); Association of Family and Conciliation Courts, Newsletter (1990); L. Hack (1987); B. Helm (1988); G. Hufnagle (1989): 35; C. M. Huddart (1991 - with caution); G. Kirkpatrick (1985); H. Landerkin (1990): 4-6; J. Lemmon (1985): 218; W. Maggiolo (1985): 109-110; J. McCrory (1987): 144; H. McIsaac (1985)(1987); J. Payne (1986a): 39-40; N. Sideris (1988); G. Swhwartz (1989): 223; and the cases and statutes cited therein.

c) There appears to be a general consensus in England that things said in conciliation are privileged and that privilege can only be waived by the parties jointly. see, for example: J. Earnshaw 1-2; A. James (1988a): 76; A. James and K. Wilson (1988): 13-14; H. Landerkin (1990): 5; L. Parkinson (1987b): 117 (1985b): 246; but I know of no English case which has firmly decided the matter nor which has commented on the limits of privilege in mediation. If the courts use the same criterion for mediators that they use for social workers, the cases of: R v Hampshire County Council ex parte K and Another, Family Law 253-4; and Re M (A Minor) (Discovery: Wardship Proceedings) Family Law (1990): 259-69, suggest that if privilege is judicially recognized, it will not be based on professional privilege, but rather on the interests of the public in promoting mediation. The cases also suggest that, if so, the granting of privilege will not be automatic, but will be granted only when the public interest in the service appears to be more important, in the circumstances of the case, than the public interest in allowing disputants the opportunity to seek legal redress or the public interest in protecting the welfare of the child. (When privilege is recognized on the basis of public interest, it belongs to the service provided, not to the disputants. The disputants may not, therefore, even jointly, be able to demand that the mediator give testimony on what was said in the mediation session. For references see above, paragraphs a and b.)

d) The general consensus among the American and English authors, appears to be that privilege is

also in a state of mass confusion about their own duties with respect to confidentiality and privilege within their own practices.

All of Greater London's mediation practitioners said that they would breach confidentiality in cases of child abuse and most, but not all, said they normally gave preliminary warnings about this to the disputants.[20] The mediators were not, however, consistent in the preliminary cautions they said they gave to disputants. They made little effort to identify for disputants other possible circumstances in which they would be unable to be kept the disputants' comments confidential. We find many other possible circumstances cited in the mediation literature, for example: proposed criminal acts; expressed intentions to harm others; information about a missing child's whereabouts; information disclosed during mediation if solicited in a perjury trial; facts (as opposed to offers, opinions, feelings) disclosed in mediation; information disclosed in mediation that the disputants otherwise have a legal duty to disclose (for example, in an examination for discovery); comments made by one of the disputants in a separate session if that disputant were to request disclosure (unless privilege in mediation is judicially recognized to belong to the service and not to the disputants, as is the case when privilege is based on public policy); everything said in mediation if both disputants waive privilege (unless the privilege is held to be based on public policy and not the mediator's

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desirable for mediation and that it should have its basis in public policy so that it belongs to the service provided rather than to the parties. We must wonder, though, about the effects this could have on people's defences to the enforcement of 'agreements' against them, defences such as: undue influence, coercion, (particularly given the finding that some mediators exert considerable pressure on disputants to reach particular agreements, see chapters 3, 4 and 5 and Appendix A-1, [particularly the descriptions of the in-court conciliation services]) and the problem of ensuring full and complete disclosure. One would hope that privilege, based on public policy, if judicially recognized, will not be construed so as to inhibit the rights of disputants (or children of disputants) to have recourse against mediators for damages suffered as a result of professional negligence or incompetence. See, for example: Gaskin v Liverpool City Council [1980] 1 WLR 1549; Vickie Howard aka Vicki Levitan Kaufman v Robin Drapkin 90 Daily Journal DAR 8667-8673 as reported in Family and Conciliation Courts Review (1991): 172-94.

20 See also: Appendix A-1. A. Ogus, P. McCarthy and S. Wray, (1987): 72, found that only 8, out of the 65 in-court conciliation services studied, indicated waiving confidentiality when children were at risk. This finding appears to be very different from that found in Greater London. It is doubtful that Greater London's practitioners were unique and different from the services included in the Ogus study. Perhaps, rather than reflecting different practices, the results are different because many practitioners do not understand the meanings of the terms 'confidentiality' and 'privilege'. Perhaps also the term 'at risk' was perceived to be broader than the term 'child abuse'. Quite a few of Greater London's practitioners did say they would only breach confidentiality if the allegations were serious, and if they were convinced that the allegations were not spurious.

professional relationship to the clients); everything said in mediation if the courts decide that privilege in mediation is based on public policy and that, in the circumstances of the particular case, the public interest in a full investigation of the case outweighs the public interest in protecting the confidentiality of mediation.[21] Perhaps, rather than confusing the disputants with long lists of possible exceptions, mediators might consider simple statements such as: 'Everything said in mediation except "XYZ" is confidential unless I am ordered to disclose what has been said in the mediation session by a court'. G. Hufnagle (1989) predicts legal actions against mediators for breaches of confidentiality when promises of confidentiality have been given and the limits of confidentiality have not been adequately explained if the disputants, or one of them, suffer damage of loss as a result of a disclosure.

Greater London's practitioners also differed in the methods of disclosure they said they used when allegations of child abuse arose. Some of the in-court practitioners said they simply specified for the registrar involved[22] the area of concern, for example, by stating the fact that allegations of abuse had arisen, without disclosing what was said by whom, and then suggested the need for welfare report. Others said that they gave the registrar full particulars of the discussions. Many of those who mediated out-of-court said they first consulted their colleagues for advice, giving them full particulars of the allegations. Others said they encouraged the disputants, or one of them, to contact social services. And still others said they contacted social services themselves. In addition to a lack of consistency in their preliminary cautions, and in the methods of disclosure they used, the practitioners also differed in the

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21 See footnote 19. These exceptions to the ability of the mediator to keep comments made in mediation confidential are those most commonly mentioned in the mediation and legal literature. Whether or not they will apply in a particular case will depend on the legal jurisdiction involved and the type of privilege judicially recognized. The list is not intended to be exhaustive. Generally privilege (or the judicial protection from scrutiny of things said) in mediation may derive from legislation or from any of a number of other sources: from common-law protection from scrutiny of things said in the course of certain professional-client relationships, from judicial recognition of a public interest in protecting the confidentiality of things said in mediation; from the protection from scrutiny of statements made during the course of settlement negotiations; from judicial recognition of the confidentiality of things said during attempts at reconciliation; from the protection from scrutiny of the activities of court officials and members of the judiciary. These protections tend to be technical in application. The limitations and scope of the protections change in accordance with the type of privilege recognized.

22 See Appendix A-1 for descriptions of Greater London's in-court mediation processes.

degree of concern they had to have about a child's welfare before they breached confidentiality. We looked at examples of this in chapter 3 and Appendix A-1 when we compared in- to out-of-court mediation services.

We shall recall, from Appendix A-1 that not all of the mediation services in Greater London offered disputants confidentiality. Those that did were not clear about their duties in this regard. For example, some mediators considered the registrars co-mediators and so felt free to disclose all comments made by the disputants and the children to them. Others considered registrars to be part of the legal adversarial process and viewed the registrar's role as merely to set the scene for mediation. These mediators did not, therefore, disclose disputant comments to them. Other in-court mediators disclosed comments made by the children to the registrars but not the comments of the disputing parents. Still other mediators commented that different registrars interpreted confidentiality differently: some demanded disclosure; others did not think disclosure appropriate. The latter group of practitioners said that they adjusted their practices according to the preferences of the particular registrar. Similar findings of mediator confusion in England can be found in the *Newcastle Report*.[23]

Complicating the practices of the mediators with respect to confidentiality and privilege further was the fact that the practitioners did not know whether or not they had a legal right or a duty to respect requests of children for confidentiality, or whether in fact they had a legal duty to disclose those comments to the other participants in the mediation process.[24] The mediators pointed out that disclosure was sometimes not in the child's best interests:

> I always see the parties afterwards [after seeing the children] and feed them as much information as I can but I always have to remember I'm also there to safeguard the children's interests. If the mother wants to keep the child and dad wants the child and the little girl wants to go live with her dad and the mother says, "no way", then how is that little girl going to feel, when having told me she doesn't want to live with mom anymore ... until the matter is finally resolved, she has still got to live with her mother. It would give me the quakes at my age. So one has to be very careful and couch it in such a way so that mother doesn't

23 (1989): 314-5.

24 Re M and N (Minors) The Times (1989): 335, and Elder v Elder [1986] 1 FLR 610, would suggest a duty to disclose, at least in in-court sessions, but neither case concerned mediation per se. Similar confusion appears to exist among mediators in Scotland: A. Mitchell and F. Garwood (1989): 285.

> wreck vengeance on the child when she gets home. That is going to give the child a terrible problem with guilt. (in-court conciliator)

For this reason many of the mediators offered children confidentiality. They were concerned that, if they were unable to do so, they would have to limit their discussions with children in order to protect them:

> If you insist on having it spelt out, people who object to your stance have the opportunity to get their way, for example in discussing whether or not a conciliator has the right to refuse to repeat what a child has said. That invites discussion and they might decide the conciliator doesn't have that right and, in my case, that would limit the questions I would ask a child. (in-court conciliator)

They expressed, on one hand, their unease about using, for settlement purposes, information given to them by children in confidence:

> I sometimes find it quite difficult getting confidential information from children and then being able to use it. I find that quite difficult. I don't know if others find that. I think quite often you wouldn't get that information if you saw them all together ... there is something there I am uneasy about. I can't put my finger on it, but from the child's point of view I don't think it is ideal. (in-court conciliator).

But, on the other hand, they supported the rights of mediators to disclose information gleaned from children when necessary to protect children's interests:

> I had one [a difficult case] where a child swore me to secrecy and yet one couldn't solve the problem without breaching it in some shape or form. What I did was to advise the parties, their solicitors, and the registrar that I felt things should be left as they were for the time being without going into the reasons why - though I think everyone could read between the lines. It is difficult because how do you deal with the problem and at the same time retain the child's trust? (in-court conciliator)

To complicate matters even further there was no consensus among Greater London's registrars about the law in this area or about the most appropriate course of action:

> Some registrars will expect you to say what the children have said, others say it is confidential and some ask you what you think is appropriate. (in-court conciliator)

The mediators reported grappling with the problem of confidentiality and children in a variety of ways. Some reported their own conclusions from the discussions with the children without going into detail about what the children had said:

> Obviously what the child tells me is confidential so I will not go into the reasons

> or the wherefores but if the child has made it quite clear that he doesn't want to see one of the parents, then obviously I've got to relay that back to the meeting to enable the registrar to make an order or not to go ahead. Very often I find parents will accept it because they can see that I am independent and impartial....(in-court conciliator)

Others negotiated the disclosures with the children:

> I try to make it as easy as I can so I tell them, 'If there is anything you don't want passed on, when we are finished talking I'll tell you what I'm going to say and you tell me if it is OK.' Often I've been told things that I just haven't repeated. Often ... I can explain it as coming from him in a good way or I an put it as coming from me: 'It seems to me that the child would like so and so' ... Judges and Registrars who have been sitting there know. You can get the message across without betraying the child while still enabling the judge to see. (in-court conciliator)

Still other in-court mediators reported that when faced with comments from a child which would have an impact the outcome of the dispute, and a child's request for confidentiality, they simply asked for a court-welfare investigation without disclosing what had been said. This approach has several advantages because it respects the child's confidences in mediation and avoids the danger that the child's views will be used to override those of the parents[25] but, from a purely administrative point of view, the approach will also create fewer on-the-spot settlements and the need for more court-welfare investigations. There is also a risk that the child will not repeat the comments in another process in which he or she is not offered confidentiality.

Perhaps there are too many variables here to be able to lay down firm guidelines. Much depends on the seriousness of the comments as well as on the personal characteristics and emotional maturity of both the parents and children. These are not the only problems. If mediators offer children limited confidentiality in mediation, how will mediators ensure children understand the limits of confidentiality? If children are not offered confidentiality, will children fail to disclose vital information relating to their own safety and welfare? Is it ethical for mediators not to inform children of the limits and scope of confidentiality in mediation before taking information from them? Will children be able to understand the limits and implications of confidentiality once these are explained? What are the mediator's

25 See chapter 3 and Appendix A-1.

professional responsibilities to children? Do or should mediators have professional obligations to ensure that the mediation process protects the rights as well as the interests of children?

The practising mediators were not able to address these important issues. The mediators' confusions about the meanings of confidentiality and privilege; their lack of understanding of the matters to be kept confidential and those to be disclosed, the persons to whom confidentiality was and was not owed, and their lack of understanding of their own legal and ethical duties in this regard, illustrate clearly the need to ensure that mediators (and registrars participating in mediation processes) receive further and continuing education and training on this subject. The lack of consistent practice and policy also make apparent the need for judicial and legislative guidance.

Let us examine now the mediators' comments about the need for new, beginning mediators to receive instruction in this area. In **Table 11-1** we learn that 69% considered it important to include a section on confidentiality and privilege as they relate to mediation in the beginning mediator's training; 20% considered the knowledge helpful; and 11% thought it not relevant.[26] Five practitioners commented that they wished they, themselves, had a greater understanding of this area of law. Those who did not think this area relevant did not think confidentiality should be offered at all:

> (Joint interview with 5 in-court conciliators) #1: In spite of everyone shouting privileged information, the first thing that clients always do [when they talk to court-welfare officers during court-welfare investigations] is to disclose what happened in that [conciliation] interview anyway. They certainly assume you know all about it.[27] So it is ridiculous and it is something that it is just the powers that be want to hang on to. [*So you think it would be better if that directive was not there?*] All #s: Yes. #1: It is one of the cherished things of the legal profession, from the President of the Family Division on down. So if conciliation doesn't work, as they see it, then they can go straight back to the adversarial war. It is part of the wheeling and dealing. That's how they see conciliation. They don't see it as something based on family therapy as social workers might ... It all seems so inappropriate when you are talking about children's welfare.

Others had not encountered problems with their own mediation agency's rules on confidentiality

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26 We shall also remember, from chapter 11, that some of the practitioners recommended that this training be included in the mediator's ethical training.

27 There is some research support for this view. See the Newcastle Report (1989): 278-285.

and so did think knowledge of the legal concepts necessary:

> Not about the law. It is fully accepted that in-court conciliation is confidential and if we are doing an in-court conciliation and a court welfare report is requested, it will go to a different officer. (in-court conciliator)

> Should the conciliators be aware of this? Well, what we say here is, 'this is totally confidential', and 'we are not reporting back to anyone', and so, if we aren't reporting back to anyone, there is no problem. (out-of-court conciliator)

Still others did not think the matter terribly important:

> I mean, we say to people that it is privileged - whether we want to be advising people on in what circumstances - .. I don't think - Helpful. I would give it low priority, between helpful and leave it out. (out-of-court conciliator)

We must accept these opinions with caution, given the mediators' lack of understanding of the issues involved.

Other practitioners, however, considered full mediator knowledge of this area extremely important, for example:

> You do need to know about that one, because you need to tell clients and you need to know what the boundaries are, and when you need to breach it. (out-of-court conciliator);

> (Interview with two in-court conciliators) #1 and 2: Essential. #1: There is a general big mess brewing around us at the moment in terms of confidentiality and client access to records and computers. It is a bit of a minefield, #1 and 2: Essential;

> Essential. The confidentiality aspect is very important. If you say it is confidential, you really should know. We don't really know, quite. (out-of-court conciliator)

Most practitioners' comments were about the importance of mediators understanding the importance of confidentiality, and adhering to agency rules, however, rather than about the importance of mediators understanding the technical legal meanings of confidentiality and privilege and their relationships to mediation. For example:

> We make up our own rules about that. [Mediators don't need] the law [but they do need to know about] confidentiality in general. (out-of-court conciliator)

> (Interview with two out-of-court conciliators) #1: We have our own rules, not necessarily legal. We have our own policy that what they say is confidential and we won't tell the court. #2: though we are pressured sometimes on that. #s 1 and 2: It is essential that you have a confidentiality policy worked out.

Given the fact that NFCC's *Code of Professional Practice* (1986), s.4(2), imposed a duty on member mediation services to have their mediators explain confidentiality and its limitations to disputants, we might have expected a higher level of endorsement of this subject.

Many of the practitioners suggested that it was necessary only for mediators to understand the importance of confidentiality and their own agency's rules. If this is correct then, in practice, mediation services need only have access to an expert who will keep the service informed of the changes to be made - as the law in this area evolves - in the preliminary explanations of confidentiality and privilege given to disputants. Perhaps then, in practice, each individual mediator need not understand the legal technicalities if the person in charge of formulating the mediation agency's procedural rules has this understanding. We are faced, however, with the relatively high priority the practitioners gave to this subject, with the confusion and variety of procedural rules created in practice, and with the fact that the law in this area is complex and in a state of evolution.[28] We must also consider the rights and interests of the disputants who might require an explanation.

Perhaps the mediators did not intend their comments to be limiting. Perhaps, instead, the mediators' comments reflected merely the practitioners' own confusions and lack of knowledge of this subject. It was clear, from the mediators' responses, that most did not fully understand the issues involved. The mediators' educational suggestions did not appear to be based on experience or expertise, but on confusion and lack of knowledge. The variable practices of the mediators, the lack of understanding reflected in the mediators' comments, and the relatively high level of endorsement given to this subject suggest the need to expand rather than to limit the training of beginning mediators in this area.

The Mediator and The Law Concerning Child Abuse

Table 11-1 tells us that 61% of the mediators thought it important to teach beginning mediators the law with respect to child abuse. The practising lawyers gave the subject lower priority. At

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28 See footnotes 19 and 21, for example.

first glance the numbers in **Table 11-1** suggest a surprising difference of opinion between the lawyers and the mediators. On closer scrutiny, however, we learn that the family lawyers and the practising mediators were not thinking of the same content.

When we concentrate on the reasons the mediators gave for their views, and the matters they recommended for inclusion, we discover that many were talking about teaching mediators how to detect child abuse, or how to comply with agency rules with respect to allegations of child abuse, and not about the law per se. For example:

> Where there is a fear of abuse of any kind, yes, they [mediators] have got to have some sort of knowledge or ability to pick it up - not only what the client has said but what he is meaning, what is he trying to tell you. [Mediators need] that ability to pick up and then to pass it on to social services if they suspect something. (in-court conciliator)

> I want to get more training for myself and the officers on this - to identify the degree of effect it is having on the child. There is a danger, parent-child relationships vary enormously, and sometimes behaviour which would trigger an investigation in one family, shouldn't trigger it in another ... Also it is quite often introduced in our work as a red herring. It depends on degree and that is where we need more training ... The problem is the balancing act: whether the sexual precociousness in a child indicates an abuse situation, or whether it is simply a manifestation of that family's norms ... We can do so much damage. I impress on the court officers not to accept that responsibility. It has to be a collective decision ... We are not the primary agency. There is the matter of alerting social services. In the extreme you could be in a situation of holding the child until a place of safety order is taken. (in-court conciliator)

> You need to know at what point you are hearing something serious enough [that] you have to refer it on, but, since in conciliation we can't actually do anything about it, I wouldn't have thought you need the law in detail. You need to know at what point alarm bells should ring and you should say, 'Sorry mate, this is where confidentiality ends' and 'I'm going to refer'. It has more to do with a common sense understanding of the child. (out-of-court conciliator)

Ten of the mediators spontaneously commented that they wished to have additional training in the detection of child abuse.[29]

Other mediators thought some legal knowledge essential for the mediation service, but not necessarily for the individual mediator:

> I don't think you do. The conciliator doesn't need it but there should be someone in the agency who is well versed in that ... The information has to be readily available. The supervisor should know. The implications are so great that one

29 For a list of education and training sought by the mediators, see Appendix A-5.

> would need to get a consultant in. I would leave it to life experience, so they [the mediators] wouldn't jump too quickly, nor would they just leave it - so that they could immediately have [access to] a consultation. (out-of-court conciliator)
>
> If you didn't have it, you would need ready access to the appropriate supervision, support, someone there to advise you when that sort of issue arises. [It is] essential for someone in the organization. (out-of-court conciliator)

Even those who did think legal knowledge important nevertheless thought an overview, rather than in-depth knowledge, appropriate. The mediators were most concerned about the need for beginning mediators to understand preliminary legal processes in child abuse cases:

> The procedures, not necessarily the law. For example the powers and authority of social services, the NSPCC,[30] and the police. A basic knowledge of the powers those agencies have to intervene. (in-court conciliator)
>
> #1: I would think in a training course, if the law was part of it, that would be as much a part of it as disposal of assets and rights. #2: I think child protection law is very important. ... #1: Child protection, yes, but the law about child protection? It might be difficult #2: But we need to know where to find out what the law is. ... #3: But this agency can't initiate proceedings for a care order. #1: Anyone can call a policeman. #2: The NSPCC or social service have to initiate care proceedings. #1: But a minimal understanding is helpful. #3: It certainly helps to have it in the background. (Joint interview with 5 in-court conciliators)
>
> More of an overview. You need to know - It helped this morning [during an in-court conciliation session] to understand the procedures of the case conference and the [social services] decision making processes: what are the criteria to get on the at risk register, what are the criteria for seeking a place of safety order, wardship. (in-court conciliator)

Again, we find the practitioners limiting the parameters of the legal knowledge being suggested, but expanding the subject to include the law's personal, and social components.[31] We can surmise, from the practising mediators' comments, that they wanted beginning mediators to be given: training in the detection of child abuse to enable them to separate real from spurious allegations; information about the mediator's duties in the face of child abuse allegations; and a general overview of the courts' and social service agencies' powers in this area, including some understanding of the circumstances in which legal powers might be

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30 National Society for the Prevention of Cruelty to Children.

31 Practitioners also expanded the stepparent category in this way. In particular, they thought, in addition to a general overview of the legal position of the stepparent, mediators need a general understanding of the personal and social problems stepparents face in family life, and also an appreciation of the methods mediators could use to include stepparents in the mediation process.

invoked. The practising mediators also hoped that beginning mediators would acquire a sensitivity to some of the non-legal, personal or emotional implications of legal activity in this area, for example:

> Children think you tell an adult something and they will take action to fix it. I had a little girl the other day who told me her father had sexually abused her. Not a bad one but serious enough to consider action to have him removed. ... We were talking and laughing and all of a sudden, she threw her arms around me and cried and asked, 'Why is it that when you tell grown ups things, they take your Daddy away so you can't see your Daddy anymore?' I have had this happen to me three times now. How am I to translate this for children: that when you tell grown ups things and ask for help, they take the things you love away? (in-court conciliator)

We cannot tell from the family lawyers' survey if the lawyers would have recommended these as the most important aspects of the child abuse for mediators. We do know, however, that the lawyers did not give top priority to the need for mediators to learn the technical, legal aspects of child abuse law.

Knowledge of Crisis Orders

Generally the practising mediators[32] were concerned only that mediators should understand what orders are available in family crisis situations, and the meaning and implications of those orders:

> Yes. You see in a meeting, I would say, 'Have you been to court? Have you got an order?'. I had one the other day and he had an ouster but it didn't say whether ... [or not he could] go back there to collect the children. The way the order was [drafted] wasn't right. And she said, 'Oh, I don't mind if he comes to the house and collects the children'. We had to say to the husband, 'You go and get that sorted out' because, say, the first time it happened it is happy and the next time they have a row and she goes to the police, he might go inside for breaking his undertaking. So you must know what the order says ... Because, say, I said, 'OK. You just go down to the house on Friday and pick her up', my gosh he'd be saying the conciliator said that ... You'd be in contempt of court, wouldn't you: telling him to break a court order! So you must know what the court orders mean, oh yes. (out-of-court conciliator)

> [We have to] explain what the orders are and what they mean, so, yes, we do need to understand them and the implications of them - the arrest powers ... We need to know what orders are available in the period of stress. (out-of-court conciliator)

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32 The family lawyers were not offered this subject for consideration.

> #1: Pretty essential, but, again, it is complicated ... #2: Helpful, rather than essential. If there is a crisis we would refer them to a solicitor. I see it more as needing to recognize an issue. #1: yes. #2: You need to know generally what these things mean - when they can get a power of arrest on a non-molestation order and when they can't. Clients will ask you. So you need to know for your own confidence. #1: [Mediators need enough knowledge to be able to say], 'you may have good grounds, why don't you talk to a solicitor?' (two in-court conciliators)

Maintenance Law And The Mediator

In **Table 11-1** we learn that few (32.3%) of Greater London's mediators thought it important, as matters stood at the time of the interviews, to include maintenance law in the mediator's training. When we look at the opinions of the Greater London's family lawyers we find that they gave mediator training in law in this area top priority. Fully 87.4% considered this subject essential and another 8.6% very helpful. Mediator trainers and academics in the United States appear to agree with Greater London's family lawyers.[33]

Seven of the 23 mediators who thought maintenance law unimportant in the mediator's training commented, however, that the knowledge would be essential for mediators engaging in financial and property mediation:

> How much you need to know depends of the service you seek to offer. If it is relation to access, then a knowledge of those other areas is not necessary. But if you broaden it to include property and finance, or even custody, then you've got to have a reasonable awareness to what the law is in those areas ... We don't want to make it psuedo-legal. That can undermine the process. But if you are going to expand to those areas, then you've got to have some sort of grounding in the law in those areas. (out-of-court conciliator)

> It would be absolutely vital if we ever went into money matters. But at the moment, when we are only dealing with access, it is not all that relevant. (out-of-court conciliator)

The remainder were considering only child mediation when they answered the question:

> No - because I never discuss maintenance. It is all about the children. (out-of-court conciliator)

> Not particularly. Because we don't - I think it is advisable to have knowledge - but you shouldn't get involved in discussing that. Ancillary relief is something I wouldn't be happy about officers discussing. (in-court conciliator)

Table 11-1 does tell us that the majority of the practitioners (77.4%) thought some

33 E. Koopman (1985a): 118.

knowledge of maintenance law at least helpful, even for those who would mediate child issues. When we examine the content of the knowledge the mediators were recommending, however, we find but limited depth:

> You don't need to understand that so much, though you still want to understand that people may go back to court for a variation of maintenance, what is likely to happen regarding the children, what happens if maintenance is not paid, what happens if the man can't pay, what provisions [for maintenance] the state can make, how maintenance can be enforced. Yes, you would need to know the basics of that. (out-of-court conciliator)

> Finance comes into it. I don't know if we need detailed knowledge. [We] need only basic knowledge. We won't be involved in discussing how much an individual should be paying. We don't need to get into that, although sometimes they may - It may assist [but it is] not an area we've needed to get right into the details. (out-of-court conciliator)

As we have noted, some practitioners qualified their answers, giving one answer to cover present circumstances and another if mediation services were to expand into financial and property areas. If we consider only the answers of the 78 practitioners who either offered full global mediation, or who expressly considered financial and property mediation when answering the question, we find that 61.5% considered the knowledge either essential (56.4%) or very helpful (5.1%) and that all of the rest (30, 38.5%) thought it at least helpful.

When we reconsider the educational backgrounds of Greater London's practitioners, we recall that only 14.3% of the practitioners claimed intermediate to extensive levels of education in maintenance law, and that almost one-half (44%) of the mediators claimed no education in this subject at all. We learned in chapters 2, 3, and 7 that few of the mediators had financial and property mediation experience. These backgrounds help to explain the lack of guidance that most of the practising mediators were able to offer concerning the particulars of the knowledge mediators need from this area. Perhaps the backgrounds also help to explain the practitioners' reluctance to endorse the importance of this subject.

Unlike the mediators, as we have seen, the lawyers assigned top priority to the need for mediators to study maintenance law. The vast majority did not think non lawyers, without extensive additional training, should attempt mediation of financial or property family law

disputes.[34] We shall examine the duration of training suggested in chapter 14. Several (eleven) of the family lawyers took extra time to express their concerns. Here are some examples of what they had to say:[35]

> Family law conciliation services should be encouraged and the present service increased. I consider that mediation in areas of property/maintenance etc., should not be undertaken by any person other than a qualified solicitor/barrister who has studied revenue law in depth and has a knowledge of the law relating to matters of financial provision and the ever increasing case-law ...
>
> I would not recommend any of my clients to attend conciliation in respect of financial matters because the conciliation services in operation do not include lawyers experienced in family law who can advise as to the fairness of any settlement reached. I find that in practice this leads to disastrous results for women who do not have equal bargaining power and for whom it is often important to make financial arrangements which will be adequate for the rest of their lives.

While we might question the lawyers' abilities to ascertain the use to which mediators should put substantive knowledge[36] and while we might also argue that the lawyers' professional self-interests may have caused them to place an undue emphasis on the importance of maintenance law, still the lawyers' views ought not to be discounted too lightly. The information in chapters 2, 3, and 7 and the lawyers' questionnaire responses make it abundantly clear that the lawyers had more far more training and experience in settling this type of family-law dispute than did the mediators.[37]

International Family Law and The Mediator

Ten of the practising mediators commented spontaneously that they wished they had more knowledge of this subject. The lawyers were not offered this subject for consideration. The practising mediators who thought beginning mediators should acquire some knowledge of this subject were primarily concerned that mediators gain a general understanding of the difficulties

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34 The lawyers appeared to be more concerned about educational issues than about protecting professional turf. Most of those who suggested that non-lawyers ought not to engage in financial and property mediation, endorsed the need for lengthy training programmes rather than the need to restrict global mediation to lawyers. See: L. Neilson (1990).

35 These quotations fist appeared in: L. Neilson (1990).

36 Given some confusion about the non-directive role of the mediator: L. Neilson (1990).

37 See also: L. Neilson (1990).

of enforcing child custody and access orders outside of the jurisdiction of English courts, and of the difficulties of obtaining children's return in cases of abduction. They also wanted mediators to be taught what to do in cases of attempted child abduction:

> Yes. That hadn't occurred to me until today. There was a feature in the Guardian about child-snatching and how in different countries, different rules apply. So until today, I would have said 'not important' but now it is important, now with more people mobile from different countries. (out-of-court conciliator)

> We are finding that that is becoming, if not essential, certainly very helpful. We've had someone come and talk to us about Israel - because we had a situation where one parent wanted to take the child to Israel ... You couldn't get them back if he really wanted to keep them, particularly if those children had an Israeli passport. So yes. If one of our conciliators were faced with this, they would come out [of the session] and check. We have a lawyer we can check with about these questions. (out-of-court conciliator)

> [Knowledge of child abduction is] either essential or very helpful, because I think if you are going into this kind of work, you have to be able to deal with crisis ... You've got to know something about abduction, not necessarily all the detail. (*Would it be useful to include a section dealing with port alerts and who to contact?*[38]) Exactly. Then again, you wouldn't need to study all the ins and outs. You could probably do it in a one day course, probably even a one-half day course ... I don't think you would need to know how to draft the documents, or what you do [a solicitor does] in detail but you have to have the knowledge that those procedures and options are there and that you can trigger them if you are worried about this kind of situation. (out-of-court mediator)

The practitioners' comments suggest that mediators need only acquire a general understanding of the dimensions of the problem and of the legal remedies available, both preventive and remedial; and that they know whom to contact with what information in the event of an attempted abduction. It appears, from the practitioners' comments, that they thought all other legal matters of an international nature should be left to lawyers. Presumably English mediators also need to be aware of the prohibitions and procedures necessary should one of the parents wish to take his/her child out of the court's jurisdiction,[39] and of their duties to breach confidentiality and the limitations on privilege, in the event of child abduction.[40] Given the practitioners' other comments, it would appear that they thought an general overview of these non-technical aspects of international family law sufficient.

38 See, for example: C. Sacks (1987): 23-29.

39 See, for example: C. Sacks (1987): 4-22; Children Act 1989, s. 13.

40 See footnote 21.

The Mediator And Law Concerning the Division of Family Property

Not surprisingly the practising mediators' comments about the importance of mediators gaining knowledge of this subject followed basically the same pattern as their comments about the importance of maintenance law. At the time of the interviews, the mediators gave this subject low priority, but when the mediators considered global mediation the pattern changed. Of the forty mediators who either offered full mediation services or who expressly commented on the knowledge needed to do global mediation, 25 (62.5%) considered the knowledge 'essential', 6 considered it 'very helpful' and the remaining 9 'helpful'. Again the lawyers thought this subject deserved higher priority: 86.8% ranked the subject 'essential' and another 9.3% 'very helpful'. Most did not think those without legal training should be offering global mediation.

In chapter 2 we learned that 60% of the mediators claimed no formal education and that only 11.8% claimed intermediate to extensive training in family law concerning the division property on family breakdown. In chapters 2, 3, and 7 we learned that few of the mediators had experience mediating these matters. Perhaps, again, the lack of mediator education and experience accounts for the low level of endorsement. While the number of mediators specifically considering global mediation does not allow us to rank the importance of this subject for the practice of global mediation with certainty, the mediators' comments do suggest a dramatic change in view when global mediation was contemplated. For example:

> [A mediator might need knowledge of law regarding property division on family reorganization] Depending on where one is conciliating, because if you are covering the whole gamut, you couldn't do it without. It is was global [mediation] it would be absolutely essential. (out-of-court conciliator)

> Not essential, although helpful. In the type of mediation they practice where they deal with access disputes. But [it would be] essential if mediators moved into the financial aspects. Also, perhaps, if they were dealing with custody. (out-of-court conciliator)

All of those who thought this subject unimportant worked in mediation services that addressed only disputes over children. Very few of the mediators were practising property mediation, and even fewer had education in the area, so they were not able to offer guidance on the specifics of the knowledge required for global mediation. We can surmise, from the

level of importance that the family lawyers assigned to this subject, that they, at least, thought mediators need to gain a solid understanding of some aspects of the law in this area. The lawyers' views are in accordance with those of mediator trainers and academic educators in the United States, who suggest the great importance of teaching mediators this subject.[41] The lawyers' views, and not the mediators' views, are also in accordance with the mediation literature.[42]

Finance And The Mediator

Generally the practising mediators gave low priority to the need for mediators to be educated in financial subjects. This was not surprising, considering the mediators' educational backgrounds and their lack of experience with and attitudes towards global mediation.[43] The family lawyers were not offered financial subjects for consideration but in spite of this, several added these subjects to their questionnaire responses.[44]

The topic given the highest priority by the practising mediators from among the financial subjects was the need for mediators to acquire knowledge of the various government financial and housing assistance programmes. Five mentioned that they desired more training in this area. While only 35% considered the knowledge of great importance, 74% of the mediators thought the subject at least helpful. The family lawyers were not offered this subject for consideration yet two added this subject without solicitation. The great importance of mediators understanding the implications of agreements and orders concerning children on families' rights to be housed by or to obtain housing assistance from the state became apparent during observations of in-court mediation appointments in Greater London. It became apparent, for example, that care was needed in phrasing agreements and orders so that family members could not incorrectly be deemed to have given up their existing housing voluntarily,

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41 E. Koopman (1985a): 118.

42 i.e.: E. Koopman (1985a): 118 and R. Dingwall (1986a); Family Mediation Canada (1990); A. Murray (1987): 134.

43 See chapters 2, 3 and 7.

44 L. Neilson (1990): 252.

otherwise they faced limitations on their rights to be rehoused.[45] Those with children were given housing priority but some housing authorities were prepared to consider only those with the residential care of children pursuant to court order. If mediators were not aware of these matters, the consequences for the families could be grave indeed. The practising mediators thought that new mediators should gain a broad understanding of the various types of financial and housing assistance available but did not think all mediators need extensive, in-depth knowledge of these programmes. They recommended referring disputants to the appropriate government offices to acquire information about the specifics of these programmes.

Before we continue our discussion of the mediators' recommendations for training new mediators in financial subjects, perhaps a few words about referrals are in order. We shall encounter the argument that mediators need only superficial levels of substantive knowledge - because other professionals can provide the specific information needed - again. The practitioners commonly argued that mediators need only enough substantive education to know when to refer disputants to others. This argument presumes a certain amount of mediator education, professional co-operation, and timely referral practices. The issue then becomes an ethical or professional, as well as an educational one: how does one ensure that mediators will in fact see that their clients obtain all the information they need to make informed choices?

This study did not investigate the actual referral practices of Greater London's practising mediators. The information would have been helpful. If in fact mediators do readily ensure that their clients have legal and financial advice from lawyers and accountants throughout the mediation process, then perhaps a general, superficial knowledge of legal and financial matters would suffice. If, however, mediators try to offer legal and financial information and advice themselves, do not readily make referrals, or only make them at the end of the mediation process, they undoubtedly need a higher level of expertise. What of the effects of professional insecurities? Do mediators try to retain professional control over their clients? Does this affect their referrals to other professionals? We shall return to this issue

45 i.e.: R, Ingleby (1988): 50.

during our discussion of the different roles of the family lawyer and the mediator at the end of the chapter. We shall explore the importance of these questions and shall find that, indeed, the referral practices of Greater London's mediators did appear to be problematic. For the moment we might wish to keep these issues in mind as we consider the mediators' other comments.

Returning now to the practising mediators' thoughts about the need to educate new mediators in financial matters: only 15.3% mentioned the need to educate mediators in living costs and financial planning or budgeting. Mediators elsewhere give this subject much higher priority.[46] Even fewer of Greater London's mediators stressed the importance of mediators understanding property values and valuation problems. The few practitioners who were concerned about newcomers to the field gaining an understanding of family finances were most concerned that mediators gain an understanding of the social and economic experiences and expectations of families living at different economic levels, and also of the stresses and strains produced by divorcing families' changing socioeconomic status. Interestingly, it appears that disputants want those assisting them to have this knowledge.[47]

Very few of the practising mediators, with the exception of the few who were lawyers (for example those quoted below) mentioned the need for mediators to have some understanding of law concerning liability for debts, or of different methods of valuing property. We find arguments in support of the need for mediators to have both in the mediation literature.[48] The subject was not offered to Greater London's family lawyers for consideration. Even so several stated, without solicitation, that mediators should acquire knowledge of the benefits and shortcomings of methods of valuing property in their preparatory training. The few practising mediators - all lawyers - who recommended mediator education in this area tended to emphasize the importance of mediators learning about business valuations:

You have to know a little bit about company valuations and the valuations of

46 E. Koopman (1985a): 125; Family Mediation Canada (1990b); S. Grebe (1988b): 16; A. Milne (1985b): 79; C. Moore (1983): 83; A. Taylor (1981): 11.

47 M. Murch, M. Borkowski, et. al. (1987).

48 For example: Family Mediation Canada (1990b); S. Grebe, (1988b): 16; L. Leob 452; R. Thorsen and D. McGill (1989): 67.

> shares if [the mediation involves] a company - to know what kind of documents to ask for. For example, things like [the fact that] a balance sheet does not necessarily reflect the [company's] true value. (out-of-court mediator)
>
> I would explain the sort of information [needed] ... And I would [ask them to] obtain that information. We would go through it together and point out the extent - for example the company's accounts might or might not reflect the [company's] true financial picture. That would be discussed quite openly. One might find, for example, the fixed assets of the company may not have been revalued for 10 years. So one would point out these things in general terms. (out-of-court mediator)

Presumably a mediator doing global mediation would also need to know something about the valuation of other types of businesses; pensions;[49] annuities and other forms of investment;[50] interests in trusts; and other types of real and personal property. The depth of knowledge needed, however, is limited. For example, none of the lawyer mediators suggested that mediators need to know how to value properties, only that they should know the advantages and shortcomings of different valuation methods - to help the disputants choose the most appropriate method.

As we've mentioned, however, most of Greater London's mediators did not consider financial and valuation knowledge important. Even when we consider the answers of the few who either specifically considered financial and property mediation when answering the questions or who commonly practised global mediation, we find a surprising number of the mediators continuing to classify mediator training in some of these areas as 'not relevant':

Table 12-1

	Essential	Very Helpful	Helpful	Not Relevant	Total
Property Valuation Problems	10(35.7%)	2(7.1%)	5(17.9%)	11(39.3%)	28
Living Costs and Financial Planning	7(24.2%)	4(13.8%)	8(27.6%)	10(34.5%)	29
Government Assistance Programmes	5(20.8%)	7(29.2%)	10(41.7%)	2	24

49 See, for example: E. Koopman (1985a): 118; A. Murray (1987): 134; H. Weingarten (1986): 196.

50 E. Koopman, ibid.

These classifications leave us wondering how the mediators envisioned helping disputants resolve legal property and maintenance disputes without understanding the information the disputants would need to gain a full picture of their own financial affairs; without knowing what documents a disputant would need to verify the ownership and value of the family's income, property, and liabilities; without knowing who within the family would have liability to satisfy what debts; without knowing the implications of the timing and form of the family's arrangements on the total resources available to the family. We might expect the practising mediators' opinions about the importance of these matters to change with further education and experience.[51]

Mediators And The Need For Knowledge of the Application of Income Tax Law

As with the other property and financial subjects, Greater London's mediators gave this subject low priority, although, again, when only the answers of those who expressly considered global mediation were considered, the picture changed somewhat. Then 45.9% (out of a total of 37) considered mediator education in income tax law essential, 2.7% considered it very helpful,[52] 37.8% helpful, and 13.5% not relevant or unimportant. Again, the family lawyers stressed the importance of this subject.[53]

The mediators who provided global mediation, or who considered global mediation when answering the question and who still considered mediator training in this area unimportant, argued:

> No. That is the solicitor's job. Not relevant. Even if we were doing property and finance. (in-court conciliator)
>
> Yes, except that we'd only do it in mediation. This isn't really part of our scheme. If there is a complicated tax problem, we refer them to an accountant. For someone [a mediator] coming in new, it is too much. Only an overview [would be needed] for mediation. Not in detail. (out-of-court mediator) [54]

51 See chapter 2.

52 'Very helpful' was not offered as a possibility. Practitioners created this category when they did not necessarily think the knowledge essential, but considered it more important than 'helpful' would imply.

53 See Table 11-1 and L. Neilson (1990): 254.

54 This practitioner is using the term 'mediation' to refer to processes which include property and financial negotiations, which are not limited to child issues.

We are left wondering why these practitioners thought income tax knowledge unimportant, given the importance that the form and timing of maintenance payments and property transfers have in determining the family's disposable income and liabilities.[55] Again the lawyers' rather than the mediators' responses are in accordance with the mediation literature. There we find an emphasis on the importance of educating mediators in income tax law.[56] If the income tax implications of the family's proposed arrangements are not considered during mediation, will the disputants' lawyers not have to renegotiate any agreements reached? If so, has mediation not become redundant? Can a mediator claim competence to mediate financial and property matters, without an understanding of the income tax implications involved? Will the mediator, whose client suffers loss as a result of entering an agreement in ignorance of the agreement's income tax implications, be held accountable for any loss to the family? G. Hufnagle (1989)[57] has predicted that this questions will be answered with a 'yes'.

We might ask ourselves similar questions about the mediator who does not understand the law relating to the ownership and division of family property. Arguably the mediator can refer disputants to their own respective lawyers for legal advice and information whenever necessary in the mediation process, but this presupposes that each disputants has retained a lawyer. It also assumes considerable mediator knowledge of the legal complications that can arise. If mediators do not have some understanding of the law, how will they know when to refer their clients to lawyers for advice? How will they be able focuss the disputants' attention on the matters to be considered? How will they be able to offer alternatives for the disputants' consideration? If the legal implications are not considered in mediation, we must assume that many of these matters would be renegotiated by the disputants or by their lawyers after clarification of the disputants' legal positions. If so, has anything (other than delay and perhaps a cooling off period) been gained? Eventually court decisions will give mediators more

55 See also R. Dingwall (1986a): 11.

56 See, for example: N. Bala (1987): 3; R. Dingwall (1986a): 11; Family Mediation Canada (1990b); S. Grebe (1988b): 16-17; J. Haynes (1984): 502; E. Koopman (1987a): 118; B Landau, M. Bartoletti, and R. Mesbur (1987): 117-125; A Murray (1987): 134.

57 33.

guidance on these matters.[58] In the meantime, it seems reasonable to assume that at least some of these matters will be decided against the mediators involved.

Perhaps many of the mediators hoped to avoid problems in this area by co-mediating with lawyers or accountants. We did see, in chapter 7, that many were prepared to welcome family lawyers into mediation, particularly in the financial and property areas, albeit with certain reservations.[59] Some researchers have found lawyers not to be interested in providing mediation services.[60] This was not the case among SFLA respondents working in Greater London, probably because they were particularly interested in non-adversarial approaches to family law.[61] Half (49.7%) of the 147 who addressed the issue indicated they definitely or probably would provide mediation services should their Law Society allow them to do so. Another 27.2% indicated they might possibly do so. Only 23.8% said they would probably not or definitely not provide family-mediation services and several of these indicated that the only reason they would not do so was because of anticipated opposition from partners or employers. While some caution should be exercised in expanding these percentages to other groups of lawyers, since it is entirely possible that the solicitors who returned the questionnaire were those most interested in mediation, it appears that some groups of lawyers are very receptive to the idea of practising mediation. This interest has been reflected in the growth of the Family Mediators' Association in England.[62] Co-mediation - where lawyers and mental-health workers mediate together - is, therefore, a possible option. Other mediators opposed the development of global mediation services because they were concerned about the need for stringent educational requirements. Still others, for example the out-of-court mediator quoted above, stated that they would refer clients to other professionals when they felt their own knowledge to be lacking. We shall discuss this alternative in greater detail shortly.

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58 Apparently there still have been few malpractice suits taken against mediators even in the United States: SPIDR (1988): 5.

59 See chapter 7 and 9.

60 Department of Justice, Canada (1988b): 188.

61 See chapter 2. The information about the solicitors' interest in global mediation first appeared in: L. Neilson (1990).

62 See chapters 1, 2, 3, and Appendix A-1.

We might want think about the reasons for the mediators' limited endorsement of the need for mediators to understand the income tax implications of maintenance payments and property transfers. The family lawyers thought this subject extremely important. Their views are supported in the mediation literature.[63] Perhaps, again, the level of endorsement reflected more the mediators' own lack of education and experience, than an educated judgement based on practical experience. We did see, in chapters 3 and 7, that few had experience with property and financial mediation. Furthermore, mediator comments about their own lack of expertise in this area, such as those following, were common:[64]

> There have been times when I wished I knew more: when people have been rabbiting on about it and I've tried to shuffle it [the discussions] somewhere else. (in-court conciliator)
>
> I know nothing about it. No, if I came across it, I would acknowledge my ignorance and send them to CAB, something like that. (in-court conciliator) [65]

Before non-lawyer mediators engage in global mediation there would appear to be a great need for further study in income tax law.

The Roles Of the Mediator And Family Lawyer: Implications For Training

Throughout this chapter, we have found the practising mediators qualifying their answers. Legal and financial knowledge was often thought necessary for mediators, but not in the same depth as that needed by family lawyers. In this section we shall look at some of the reasons why this might in fact be so. As we think about the role of the mediator and consider some of the differences between that role and the role of the family lawyer,[66] we begin to see why the depth of legal knowledge needed by mediators might be different from that needed by family lawyers.

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63 E. Koopman (1985a): 118; D. Brown (1982): 22; R. Dingwall (1986a): 11; Family Mediation Canada (1990b); S. Grebe (1988b): 22-3; J. Haynes (1984): 502; J. Lemmon (1985): 93; L. Parkinson (1985a): 242-3.

64 The mediators were not asked a specific question about their formal education in income tax law. It is, however, unlikely that they would have had more education in this area than they had in maintenance and matrimonial property law. See chapter 2.

65 Both quotations were taken from in-court mediators. This is coincidental. With rare exceptions, I did not form the impression that the out-of-court mediators were more knowledgeable.

66 See also chapter 9 and L. Neilson (1990).

Generally, within the confines of acceptable professional conduct, the lawyer tries to get the best result for his or her client. In order to do so, he or she must be able to predict, with reasonable certainty, the decisions a court would make in the client's individual case. The lawyer must also have technical and procedural knowledge. For example, he or she must know which courts have jurisdiction to grant what relief; what legislation and cases are applicable to the client's particular case; what evidence he or she will need to adduce in order to establish the client's claims; what procedures he or she will need to follow in order to present that evidence and to get the results sought. Furthermore, the lawyer assumes professional responsibility for the resolution of the client's dispute. With responsibility comes the assumption of power. He or she assumes a protective, partisan role that is often directive while it is supportive. The lawyer will often appear to be biased against the positions and interests of his or her client's opponents.[67] He or she owes no professional duty to those opponents.[68]

The practising mediators tell us that the mediator's role is rather different. In chapter 4 we learned that, instead of assuming professional responsibility for resolution, the mediator encourages disputants to resolve their own difficulties. In order to help the disputants do this, the mediator tries to ensure that the interests and positions of all family members, including those of the children, are considered. He or she is not partisan but owes a professional duty to all disputants equally. The mediator promotes and protects disputant, rather than professional decision making, thereby leaving responsibility and power with the disputants. We saw, in chapter 4, that most of the practising mediators did not think it good practice for mediators to

67 While this is the situation as it appears to the opposing party, the lawyer's own client may perceive the situation quite differently. He may find that, in his relationship with his lawyer, that the lawyer encourages compromise and settlement. In fact family lawyers do spend a great deal of their time promoting settlement rather than adversarial positions. See, for example: L. Neilson and chapter 9. Even within the adversarial process, the lawyer will not always assume a role which is in opposition to the interests and positions the client's opponents. Sometimes disputes and conflicts are apparent only. They are simply manifestations of misunderstandings and faulty communication rather than reflections of opposing interests. Furthermore, particularly in family cases, the lawyer will help the client weigh the costs (emotional and financial) of pursuing opposing interests. When those costs outweigh any benefits to be gained, the lawyer (with the permission of the client) will usually adopt a different role. In these cases much of the lawyer's time will involve promoting, clarifying, and solidifying common interests and areas of agreement.

68 Except collaterally by virtue of professional ethics, and professional responsibilities to the courts, society, and the legal process.

promote a particular outcome.[69] Thus we might expect the practitioners to tell us that mediators do not need to know the decision a court would make in a particular dispute, but only the broad parameters of legal acceptability.

Generally the practitioners did this. They recommended that mediators acquire a broad overview of the law in the areas relating to their practices. They said that this overview should include study of the range of agreements acceptable to the courts and should ensure the mediator's ability to identify areas of legal complexity to refer those to lawyers. Generally the mediators thought the legal training should include enough exposure to the law to enable the mediator to clarify for disputants the information given them by their lawyers; and to enable the mediator to understand the significances of the lawyers' information and advice; and finally to ensure the mediator's understandings of the meanings, and legal and practical implications, of various court orders and agreements. The practitioners defined the parameters of the legal knowledge required as follows:

> #1: But I don't see how conciliators coming in could have all this [legal] knowledge. I don't think it is possible. #2: We have to have some. We've got to know when to ask the lawyers. # 1,2,3 and 4: Yes. #2: Which means you have to know something about it. That is true of a lot of these things: we have to know what we don't know. #3: My feeling is - the question is how much do we need to know. My feeling is, as long as I had a broad outline of the parameters of what is permissible, I don't need to know as much as a lawyer. (out-of-court conciliators)

> In training mediators there is a wide range of legal queries that they may need to have some answers to, as distinct from knowing how solicitors practice and how the law is implemented. We need a wide overview, it seems to me. Because at the end of the day they could run into - It is going to be a three year course at that rate. .. Rather then specific knowledge, we need a general overview about what sorts of legal rights our clients have. (in-court conciliator)

> An overview is right but there is a danger in too much knowledge. We are not legal advisors and it [division of property on family division] is a very complex area of law. My inclination is to advise the parties that this is an issue of sufficient complexity that they need additional advice on it and not to try to sort it out for themselves. It is more for that type of advice: whether it is a minor issue that they can talk out on their own or whether it is more complex and needs some legal advice. That is the area I'd hope we'd have. (in-court conciliator)

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69 See chapters 4 and 5. In practice it appears that some mediators do push disputants to accept particular outcomes, at least on occasion, however, see: chapters 4, 5, and 9.

These suggestions are consonant with the mediation process as it has been described throughout this study.

There are problems, however, with the practising mediators' suggestions. In chapter 7 we noted that twenty-four of the practitioners made comments indicating that they thought it part of the mediator's role to offer legal advice.[70] I offer here several examples:

> For instance someone rang me the other day. She had always paid the mortgage on her flat. He disappeared and now she has some money coming to her from her parents. She asked, 'Has he any rights as he disappeared and never contributed?'. He hasn't. We have to know the basics. (out-of-court mediator) [71]

> People often want legal information and it is helpful to say, 'I will tell you what is likely to happen in court'. (out-of-court conciliator)

This was in fact a minority position. Most practitioners were careful to distinguish their own role from that of the family lawyer. For example:

> I think it would be quite useful to have some general background [in maintenance law] but the danger is that you give somebody a course on something and they think they are experts in it. That is the danger. What I think is important is to create boundaries so you know when you are stepping into something that needs looking at but which you don't have the skills to deal with it. I mean, as a social worker I know that I don't know about diabetes but I can recognize when there is a problem which needs a consultation with a doctor. (out-of-court conciliator)

> It is important for the mediator to have clarity about where you go for particular types of advice. If clients going through divorce want advice, they should go to the particular service which provides that service. (*So if legal matters came up, you would refer out?*) I would refer out because otherwise you can end up working against what you actually set out to do in the first place, which is - the law is complicated and something a lay person does not understand - and what appeals [about mediation] [and what] is its very effectiveness, is that it is not to do with all this legal mumbo jumbo. But you have to accept that there is a legal framework. (out-of-court conciliator)

> It is important to know about [the roles of the different professions], yes. And to know so you don't encroach on areas where you are not an expert ... If I am not a lawyer, I won't go into it. And if I'm not a psychiatrist, I won't go into that. [But] I need to know enough to understand what a psychiatrist is telling me.

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70 For discussion of the differences between legal information and legal advice, and the problems both pose for practising mediators, see chapter 7.

71 This type of information giving is clearly outside of the role of the mediator, as the practitioners identified that role in chapters 4 and 5. One might expect this of a legal, not a mediation service. Any non-lawyer offering such a service would clearly be open to a practice of law challenge and we might wonder whether or not a mediator's (as opposed a lawyer's) insurance would cover client losses suffered as a result of faulty or misleading information given in this manner.

(out-of-court conciliator)

> We are very into asking people to get legal advice. We are not into giving people legal advice. We are not qualified to give legal advice. We do know certain things and we can clarify certain things but they have solicitors and they must use them. (out-of-court conciliator)

In chapters 4 and 5 we found the practising mediators stressing the importance of mediators not assuming the role of expert. We find that outlook repeated here. Most of the mediators thought consultation with experts should occur independently of the mediator.

Inherent in the practitioners' comments, however, is an assumption that all mediators are ready and willing to refer legal questions arising in mediation to family lawyers. As we have mentioned, most of the practitioners, when they made proposals for the mediator's education in law, assumed that the mediator's clients would have their own lawyers who would be available to give legal information and advice. The mediators argued, for example:

> Well I am assuming that the mediator is going to follow the guidelines of mediation [and] that the agreement is provisional and will be checked by their independent legal advisors who will pick up any problems. (out-of-court mediator)

> My usual thing around income tax is [to say], 'I know there is something about that. I've read it but I don't know the details. I'm sure your solicitor can help'. Really it is a minefield. You can get in trouble if you give people advice and then get sued for it. You need to have enough knowledge to create a warning. Because you really must see to it that your clients, if there is significant money or property around, to make sure they see people who do [have expertise]. (out-of-court mediator)

The availability and use of independent legal advice at the beginning and throughout the mediation process could be expected to reduce the onus on mediators to acquire detailed legal knowledge. It was clear, however, from some of the mediators' comments, that referrals to lawyers were not always being made - because of the disputant's or the mediator's reluctance to involve them in the process. Some mediators, for example the one quoted below, encouraged the use of independent lawyers:

> The alternative is between mediation and litigation. It is not an alternative between mediation and legal advice. (*Are most of your clients represented by lawyers?*) If they aren't when they come, we certainly try to ensure that they go. I don't think we would be at all happy - I don't think we would conclude a mediation process without them seeking advice. If someone actually refused and

> said I'm not prepared to, we'd still write up the agreement, say it was subject to legal advice and they would be strongly advised to obtain legal advice. (out-of-court mediator)

Others, however, appeared to be antagonistic to lawyers or reluctant to have contact with them:[72]

> We have very little contact with lawyers. I don't feel it necessary to be in touch with them. (out-of-court conciliator)

> They [lawyers] have to have things in legal packages all the time ... We were working with a couple who started their divorce perfectly amiably and because they came to a cranky agreement over property - neither of their solicitors could bear it and they changed their arrangement. It wasn't an even arrangement and the whole situation blew up. The solicitors were going back and forth so they ended up back here, after not talking to each other for weeks. So we are now conciliating with the solicitors trying to get it back to where it was. (out-of-court conciliator) [73]

> Conciliation is one way of reducing conflict for the parents and children, cutting down on the expense and I think it could be done much more simply by cutting out solicitors. (in-court conciliator) [74]

> Some solicitors and lawyers now think they can offer some kind of conciliatory service and we have had hostility there ... And some lawyers don't want their clients to come unless they are allowed to be there and for our job, it is absolutely essential that they are not there. We have some of them telling their clients what to say. ... We have also had to tell people that they instruct their

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72 a) On the one hand the protection of confidentiality would appear to prevent mediators from communicating with the disputant's lawyers without the disputants' permission. (Most agencies had adopted a policy that any information given to one lawyer must also be given to the other.) In some cases this might appear to make referrals to the lawyers with legal questions, about the particular matters in dispute, problematic. On the other hand, one might expect that inter-professional co-operation and the sharing of professional information and expertise at an early rather than at a late stage in the mediation process would benefit both disputants in most cases. (See, for example: H. Elson (1988): 151; C. Leick (1989): 37; J. Melamed (1989): 18; A. Milne (1988b): 396.) One might expect that most disputants, if asked, would expect their mediators to ensure that they were being keep abreast of the legal implications of the matters being discussed, throughout the mediation process.

b) Furthermore, if independent lawyers are to advise mediation clients on the advisability and feasibility of financial and property agreements reached in mediation, they will need access to the information relied upon during the sessions: C. Leick (1989):37; M. Rutherford (1986): 23. Otherwise, in order to protect themselves from liability, they will have to go through the full discovery process and redo much of the work already done in mediation. Or they will have to make their advice dependent upon full disclosure having been made in the mediation process. This begs the question of who has the ultimate professional responsibility to the disputants to ensure full financial disclosure: the lawyer or the mediator?

73 As we noted in chapter 7, a significant number of the mediators occasionally provided global mediation services. Presumably some of the problems in this case might have been prevented had the disputants been referred to their lawyers for legal information and advice, to make them aware of their legal positions, early in the mediation process, before final negotiations were contemplated. The quotation reflects also a clash in professional point of view: the lawyers' concern with the fairness of the agreement, versus the mediators concern to promote communication and reduce conflict.

74 This practitioner did go on to state: 'On the other hand there is privilege and freedom. People have to be able to have one, if they want one.'

> solicitors, their solicitors do not instruct them - because we have had people who wanted to try more sessions but they didn't think their solicitors would let them. And you have to tell them that the solicitors cannot tell them what to do. ... We have had some angry phone calls where they have reached agreement and then the solicitors say that it is not in their client's interests and I am going to tell him/her not to do that. (out-of-court conciliator)
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> I think if is very wrong for conciliators to even be thinking about it [the law]. We want to try and avoid - we want to go back to a solicitors and say, 'Look, we've come to an agreement'. That is what we are there for. So I don't want to know about the lawyers, the law, and all that. I feel quite strongly we shouldn't get caught up in that. (out-of-court conciliator)

The practising mediators were not asked specifically about their referrals to lawyers.[75] During the course of this study, however it became apparent that, in spite of practitioners' claims that they did not need extensive legal knowledge - because they could refer disputants to lawyers for legal information and advice - these referrals rarely occurred during the process but only at the end, if at all, after tentative agreements had been reached. In fact many services gave mediated agreements to the disputants and left it open to them whether or not to contact their solicitors.[76] One is left wondering how many of these agreements had to be renegotiated after the legal implications were explained. Certainly the Newcastle Report suggests that few of the global agreements reached in that study were routinely turned into court orders by the lawyers involved.[77] Given the practitioner's lack of education in family maintenance and property law, child law, and income tax law,[78] this is not surprising. Nor would it be surprising to discover that agreements reached by disputants with the assistance of mediators having no specialized training in property and financial issues were general, lacking in detail and complexity. Certainly we found that the agreements described by the mediators in Appendix A-1 appeared (with the exception of the service staffed by lawyers) to be suspiciously lacking in complexity.[79] There is a need for more research on this issue.

Even when the mediators did indicate a willingness to consult lawyers about legal

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75 For some of the reasons for lawyers do not refer more clients to mediation, see L. Neilson (1990). More use of lawyers for legal information and advice throughout the mediation process, might help alleviate the lawyer's fears and could produce higher referral rates. It might also reduce the need to renegotiate.

76 See Appendix A-1.

77 (1989): 345-347.

78 See chapter 2.

79 See in particular, services 6, 11, and 14. But see also: J. Kelly (1990) and J. Pearson (1991).

issues arising in mediation, the form of the referral they said they used often illustrated a desire to retain control over both legal information and the disputants,[80] for example:

> Helpful. But I think if that [a particular legal question] turned up in the room, I'd go to an expert for advice. I don't think we can be experts on everything. You need to know where you should go to get that information. There ought to be a solicitor who is at the end of a telephone - so you can say [to the disputants], 'Come back next week after I have checked this out'. That would probably be the best thing, because you can't have your conciliators experts on everything. (out-of-court conciliator)

We can readily envision potential problems for both the mediators and the disputants here. The first problem is that the lawyer can probably give much better advice after having heard first hand the client's fears and the circumstances of the problem being presented, and after he or she has had an opportunity to do research. The second problem is that the lawyer is in a conflict of interest situation. When disputants have opposing interests, the advice that a lawyer will give to each independently will be very different from the advice he or she would give to the other or to them both jointly. Both clients might be better served by receiving partisan support, information, and advice from their own lawyers. Finally, there is the problem of privity of contract. Who is professionally responsible should the lawyer's advice be wrong, should damages result? In this example, the disputants haven't sought legal advice, the mediator has. Furthermore it is the mediator, not the lawyer, giving the legal advice to the disputants. It would appear, from the quote, that it is the mediator, and not the lawyer, who has the professional relationship with the disputants. Is giving legal advice part of the mediator's role? As we have seen, most of Greater London's practitioners thought it was not.[81] If not, will the mediator's insurance offer any protection to disputants should the mediators be held liable for damages suffered as a result of the erroneous or misleading legal advice? These problems are avoided if disputants are referred back to their own lawyers.[82]

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80 See also: M. Richards (1990): 437.

81 If, on the contrary, legal advice is part of the mediator's role, one would assume the need for mediators to have levels of legal education comparable to that of lawyers.

82 When the disputants do not have lawyers and do not wish to have legal advice, perhaps the best way to protect both the disputants and the mediator is the solution offered by one of the practising mediators: making all agreements subject to legal advice, and advising the disputants in writing to obtain that advice.

Clearly there is a need for mediators to develop close professional working ties with family lawyers. In fact, a number of practising mediators suggested that it would be very important to include in the mediator's training a section on mediator-to-lawyer referrals and inter-professional co-operation; for example: [83]

> We need to know about procedure: that people can get orders, that you have to have grounds, knowing what orders and powers are available. ... [But] we are never going to be specialists. So what we need to do is know enough to be aware of the problems, so that we can consult our specialists, and to talk openly and freely with them, to help the clients communicate with their solicitors. And I think that should be part of our training: how to liaise with the solicitors. I don't think we are here to take over from solicitors. (out-of-court conciliator)

Even with close professional ties between lawyers and mediators, and even with stringent ethical guidelines requiring mediators to refer disputants to lawyers, however, the mediators in Greater London were not ready for global mediation. We saw in chapter 2 that they lacked legal and financial training and had little practical experience working in these areas. In chapter 7 we learned that few were confident of their own abilities to handle global mediation - without the assistance of family lawyers or without extensive retraining. In this chapter we discovered that many of the practising mediators did not appear to understand the problems involved in financial and property mediation nor the education and training needed to carry it out. We found that, for the most part, the mediators' understandings of the legal and financial education and training needed were not in conformity with the opinions of mediators elsewhere or with the mediation literature. In chapter 5 we noted the concern of practising mediators that, while disputants understand the needs and interests of their own children, most disputants, particularly women, do not have expertise in matters of family finance, property, and taxation. One would assume, given the intricacies of the law in this area, and the lack of disputant expertise, the need for mediators to guide the disputants to the issues to be addressed, to the evidence and information to be considered; to guide the disputants to their lawyers when procedures are necessary to prevent the disposition or obliteration of assets; to inform the disputants of the legal, financial and practical implications of proposed solutions; of the

83 See also chapter 11.

boundaries of legal acceptability and feasibility; of the need to consult their own lawyers as complicated legal issues arise; of any gross inequities in their proposed solutions. In chapter 7 we discussed the knowledge mediators would need to prevent inequities arising in mediation due to disclosure problems. We know, from our earlier discussions, that this legal and financial knowledge is needed, not to tell the disputants what they ought to do, but to ensure that they have all the information they need to make fully informed decisions. It was clear, from the mediators' comments, that the practitioners were far from possessing this level of legal and financial expertise.

The amount of legal education a mediator will need, in addition to being affected by the degree of co-operation and consultation occurring between mediators and family lawyers, will also depend on the mediator's style of practice. The practitioners thought that those who practice mediation with lawyers would probably need less legal education than those practicing alone:

> Some of the laws around divorce apply or can be used as a point around which to start but there is more to it than that. For example, trusts. I don't understand that and I don't think it is my job. I can say, you had better go see somebody. [We need] an overview [of the law relating to the division of family assets upon family separation and divorce] definitely. There are some centers in the United States where lawyers are part of the team. That would solve it to a certain extent. (out-of-court mediator)
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> These questions are written on the assumption of a conciliator working on his own, whereas here, in our scheme, you are doing it with a registrar, who has the answers to all these [legal areas]. I can see, if I was seeing couples on my own, I would get asked all sorts of questions I don't have the answers to and which are now answered by the registrar. I don't need to know most of these things, because I am working with the registrar. If the scheme changed, for example, if people had to come to see us first, and then when an agreement was in the offing, and appointment was then made to go before the registrar, then I can see one would need a lot more knowledge than I do now. (out-of-court conciliator)[84]

We learned, in chapter 7, that most of the practising mediators were prepared to accept lawyers as mediators. As we have seen, Greater London's family lawyers reciprocated by expressing

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84 This practitioner noted his reliance on the registrars for legal information during in-court mediation. This is one of few advantages of having mediation occur in court.

professional interest in mediation.[85] Teamed co-mediation - where lawyers work with mental-health workers to provide global mediation - would help to alleviate some of the substantive educational shortcomings of the practising mediators we have discussed in this chapter but, unless both mental-health workers and lawyers are also exposed to educational programmes in mediation, this is not likely to be the best long-term solution. We must consider also the role of the mediator as it was identified in chapters 4, 5, 8 and 11, particularly the paramount importances to mediation of disputant autonomy and non-directive procedural expertise. We must also consider the apparent shortcomings of the collateral professions in this regard.[86]

Summary And Conclusions

As we review the practising mediators' educational proposals, we find further support for the family lawyers' concerns about the mediators' lack of educational preparation for global mediation. The mediators were not able to identify the substantive legal education needed for practice. They lacked education, experience, and an understanding of the issues involved. The lawyers' recommendations appeared more credible and were in accordance with the mediation literature. We had, therefore, to adjust the practising mediators' views of the substantive education required to do global mediation by giving weight and consideration to the views of the family lawyers. While the lawyers possessed superior understanding of the substantive expertise required, not all of the mediators' comments were without merit. The mediators had, for example, a clear understanding of the role of the mediator, and thus a solid understanding of the use to which substantive legal knowledge should be put in mediation. They also understood the different roles of family lawyers and mediators and could, therefore, offer some general guidance on the depth of legal knowledge required.

As we review the legal and financial substantive subjects suggested, giving more weight to the lawyers' than to the mediators' views, we discover the need to teach mediators, who might wish to practice global mediation, an general overview of law with respect to the

85 L. Neilson (1990).

86 See chapters 8 and 9.

division and allotment of the family's income and property on separation and divorce; to teach them child law, divorce law, income tax law with respect to transfers of money and property between family and former family members. We discover the need to give them a general understanding of the processes available to family members for their protection during periods of crisis, the law with respect to liability for debts; and, from international law, the need to teach them about judicial recognition and lack of recognition of orders concerning children granted in different jurisdictions, about child abduction and the preliminary processes available to prevent children from being removed from the country; and finally to teach mediators enough evidentiary and property law to enable them to cope competently with disclosure problems[87]. The mediators suggested the need to include in the mediator's training a section on detection and reporting child abuse; and a section on government assistance programmes and regulations, particularly those affecting family housing. From the mediators' comments we can also surmise the need for educators to have mediators consider, not only law, but also the social and practical effects of applying law. In addition, it appears that global family mediators need to be informed of the advantages and disadvantages of the various methods commonly used to value property; and of the financial structures and budgeting problems of families living at different economic levels. Presumably they would also be well advised to acquire a basic understanding of corporate and partnership structures, of insurance, trust, and inheritance law.

Having said this, the practising mediators' descriptions of the role of the mediator also made clear the fact that mediators do not need the depth of specialized, technical legal knowledge that family lawyers need. Thus we found the mediators suggesting the need for mediators to acquire a basic, general understanding of these legal and financial subjects. It appears, from the mediators' comments, that mediators need to understand the parameters of legal acceptability, that they also need enough legal education to fully understand the matters in dispute and to emit an aura of competence. More specifically, the mediators suggested the need for beginning mediators to taught to identify the types of orders and agreements unacceptable

87 See chapter 7.

to the courts; the matters involving legal complexity and requiring legal advice; the need for beginning mediators to acquire an understanding of the meaning and implications of the various court orders they might encounter during mediation sessions; the need for new mediators to become familiar with family law terminology and the legal and practical implications of the various types of agreements disputants might reach; and to acquire enough legal knowledge to be able to communicate with and understand the comments of the disputants' lawyers and to be able to clarify those comments for the disputants. Presumedly mediators who draft agreements will need additional legal training, to gain, for example, an understanding of the legal, financial, and practical implications of phrasing and timing; of failing to consider assets or liabilities; of failing to consider the effects on the family's financial affaires of future contingencies; and to become aware of some of the more common drafting errors.

Most of the practising mediators did not think new mediators would need to acquire the depth of legal knowledge required to predict a court's decision in each particular case, however. While we might try to argue that the practitioners' suggestions about the depth of legal knowledge needed merely reflected their own lack of education, we found that the practitioners' comments about the general depth of knowledge needed were congruous with the role of the mediator as it was identified in chapters 4 and 5. The practitioners argued convincingly that mediators do not need to know the law in nearly as much detail or depth as do family lawyers, because the mediator's role is different. Most[88] were able to distinguish the two roles. If the mediator's role is to help the disputants make their own decisions, in their own ways, without reliance on court decisions but within the parameters of legal acceptability, and if mediators refer disputants to lawyers whenever legal advise is required, mediators do not need the technical legal precision required of lawyers. Nor do mediators need to know the law's technical and procedural aspects since they do not prepare cases for the courts or represent people in legal processes. Mediators, furthermore, do not use legal knowledge in the same ways as lawyers. In chapters 4, 5, 7, 8, and 9 we learned of the importance of

88 A substantial minority did exhibit some confusion. See chapter 7.

distinguishing between information and advice. Lawyers advise clients to take particular courses of action, mediators give clients information on which to make their own decisions.

Throughout the mediators' comments in this chapter we have encountered repeated assertions that the mediators would refer disputants to lawyers whenever matters of an intricate legal nature arose in mediation. We found that there were several problems with this proposal. The first was that it appeared highly questionable that the mediators had the legal education necessary to enable them identify legal problems when they arose. The second was that the comments of many of the mediators disclosed a distrust of lawyers or a reluctance to involve them during the currency of mediation. This needs to be addressed in education and training programmes and also in the professional codes of conduct.

This was not the only matter requiring educational attention that surfaced in this chapter. We also found that the mediators did not understand the legal implications for mediation of 'confidentiality' and 'privilege' and found that this was affecting the quality of service they were providing. The mediators did not understand their own professional responsibilities, much less the legal technicalities of these concepts. Even so, the majority considered it important to include this subject in the preliminary education and training of mediators. The practitioners appeared to uncomfortable in their attempts to practice mediation without this knowledge. Be that as it may, the practitioners' comments suggest the pressing need for both preparatory and remedial mediator education on this subject and also the need for judicial or legislative guidance.

This completes our examination of the practitioners' proposals for the content of mediation training. It appears that non-directive forms of conflict resolution methodology should form the core of the mediator's training. It also appears important, however, for mediators to have some substantive knowledge of the subject matters being disputed, not in order to tell disputants what to do, but in order to understand their comments, to present an aura of competence, to give assistance in periods of crises, and to guide them through a fair and informed resolution process. In chapter 14 we shall look at the course structures the

practitioners envisioned using to teach these subjects to beginning mediators.

CHAPTER 14

Future Training Programmes For Mediators: Course Structure And Duration

Introduction

In chapters 4, 5, and 6 we explored with mediation practitioners, the goals of the mediation process, and the role of the mediator within that process. We found that once the practising mediators had identified the mediator's role and the importances of dispute- or conflict-resolution and disputant autonomy, their recommendations for the educational content of the mediator's training followed.[1] We have also explored the goals of educating mediators: 'professional objectivity' but not 'professionalization'[2]; the personal and professional characteristics of those who should be admitted to training programmes; and the subjects they should be taught following their admittance. This gives us the information needed to put the practitioners' educational recommendations into context. We shall now examine the practitioners' thoughts about the adequacy of mediation training and their proposals for training programmes in the future. We shall look at child and global mediation separately and shall contrast and compare the mediators' with the family lawyers' recommendations.

The practising mediators and the family lawyers had similar concerns about the education and training of mediators. The mediators were unanimously of the opinion that the educational programmes available to mediators in England were inadequate. The lawyers were concerned about what they perceived to be a lack of education and training among those practising family mediation. We shall find, perhaps

1 J. Walker (1988): 264 predicted that once the parameters of mediation were clearly identified, the education and training needed to perform it would become clear.

2 See chapter 10.

surprisingly, that the educational programmes that the mediators proposed were remarkably similar to those proposed by the family lawyers. The practitioners from both disciplines suggested courses of considerably greater length than most of the educational programmes offered to mediators today.

Current educational programmes vary from the 2- and 3-day or 20-hour workshop variety to post-graduate university degree programmes[3]; most are about 40 hours long.[4] Some training programmes require a professional qualification for entrance,[5] others also require 'professional' experience.[6] Many programmes have no prior educational or 'professional' requirement.[7] In North America mediation training was first developed for members of existing professions. Much of the training is provided by private trainers on a fee paying basis. Thus, while some practitioners and academics suggest the need for academic and post-graduate programmes,[8] educational

3 a) D. Brown (1982): 21-2; A. Cornblatt (1984-5): 104-5; A. Elwork and M. Smucker (1988): 23; S. Grebe (1988b): 14; J. Scimecca (1987): 30.

b) For information about training programmes of 20 hours and less, see, for example: A. Bissett-Johnson (1987): 102-3; A. Elwork and M. Smucker (1988): 23; Family Mediators Association (June 1989); Family Mediation Canada, Resolve Vol.1, No.2 (1985): 8; Family Mediation Canada (1990): 17-18, 28, 29, 38; J. Forster (1982); L. Parkinson, (1986): 111, (1987f): 21.

c) For information about programmes in the 21 to 39 hour range, see, for example: D. Brown (1982): 21-2; A. Cornblatt (1984-5): 104; A. Elwork and M. Smucker (1988): 23; Family Mediators Association, Training (June 1989); Family Mediation Canada (1990): 6, 10-11, 12-13, 14, 19-20; 21-22, 23-24, 38, 39; J. Pearson and N. Theonnes (1985a): 483; L. Riskin, (1982): 50.

d) For information about programmes in the 40 to 60 hour range, see, for example: Family Mediation Canada (1990): 7, 8, 15-16, 26-27, 34, 35, 37; Polytechnic of North London, Course Outline, (1987); NFCC (1988a,b); S. Steir and N. Hamilton (1984): 741.

e) For information about programmes offered at the university and post-graduate levels, see, for example: D. Brown (1982): 21-2; A. Cornblatt (1984-5): 104-5; A. Elwork and M. Smucker (1988): 23; K. Foy (1987): 83-96; S. Steir and N. Hamilton (1984): 741; University of Maryland at College Park, Course Outline (1987).

4 S. Chandler (1985): 349; K. Duttenhaver (1988): 9; A. Elwork and M. Smucker (1988): 23; Family Mediation Canada (1990); J. Fuhr (1987): 65; S. Grebe (1988b): 14; L. Hack (1987): 9; E. Koopman (1987a); C. Moore (1983): 87; NFCC (1988).

5 For example: A. Cornblatt (1984-5): 104-5; K. Dutenhaver (1988): 9; Family Mediators Association, Training (June 1990); L. Hack (1987): 32; J. Lemmon (1985a): 22, 102; J. McCrory (1987): 149; H. McIssac (1983): 50; NFCC (1988c): 14; S. Steir and N. Hamilton (1984): 694; L. Silberman and A. Schepard (1985): 400.

6 For example: A Cornblatt (1984-5): 104-5; K. Dutenhaver (1988): 7; J. Lemmon (1985a): 102; J. McCrory (1987): 149; H. McIssac (1983): 50; L. Silberman and A. Schepard (1985): 400.

7 B. Bautz and R. Hill (1989): 33; K. Dutenhaver (1988): 9; NFCC (1986b); Society of Professionals in Dispute Resolution (1988).

8 M. Elkin (1985): viii; E. Koopman and J. Boskey: 7; E, Koopman (1985a): 118; E. Koopman,

programmes of shorter duration proliferate.[9] We find the same trends being encouraged by mediation associations, perhaps because of financial limitations and the associations' needs to attract and retain members. In this study we find that the mediation and family-law practitioners both considered these programmes inadequate properly to prepare students for practice.

Throughout the mediation practitioners' educational recommendations, we find a continuing emphasis on the importance of procedural expertise in conflict-resolution, and a consensus - shared by the family lawyers - about the importance of exposing beginning mediators to a period or periods of supervised practice or apprenticeship. We also find, however, a lack of consensus on where mediation courses should be taught and the best methods of instruction. Only a minority emphasized the importance of including an academic component in the mediator's training. The majority considered theories and academic forms of learning to be unimportant or even irrelevant. To a certain extent this view reflects the practitioners' perceptions of the role of the mediator: procedural and facilitative rather than expert and directive. We shall suggest that it also reflects the early stage of mediation's professional development. Let us turn now to practitioners' comments.

Practitioner Views of the Adequacy of Current Training Programmes for Mediators

In England much of the family-law mediation training is currently provided by the training officers of professional associations of mediators: the National Family Conciliation Council (NFCC) and the Family Mediators Association (FMA).[10] The courses that these associations offer[11] are of relatively short duration: 5 days to 45 hours plus a period of supervised practice. At the time of this survey these courses were in

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A. Dvoskin, E. J. Hunt, N. Contri (1987): 7; A. Milne (1984): 56, (1987): 98-9.

9 See footnotes 3 and 4.

10 See chapter 2 and Appendix A-1.

11 NFCC upgraded its educational programme in 1988. FMA began its training programme in 1989, see chapter 2.

process of being developed. Greater London's mediators therefore had available to them only periodic seminars, lectures, and workshops, sponsored by the mediation services; national and local mediation conferences and workshops; sporadic training courses provided by NFCC's training officer; and a twenty-two, two-and-one-half hour session course in mediation offered by the Polytechnic of North London. In addition, the Institute of Family Therapy in London had occasionally offered twelve to twenty session courses in family mediation taught from a family-systems perspective.[12]

Many of Greater London's out-of-court mediation services had developed their own training programmes. These usually took the form of a series of lectures and role plays given by local solicitors, mediators, and probation or court-welfare officers. They varied in length from ten to fourteen sessions. The Bromley mediation service (service 5, Appendix A-1) occasionally offered mediators from other services the opportunity to work with one of the service's experienced mediators for a limited number of sessions to gain experience; it expected all of its own mediators to work with an experienced mediator for a probationary six month period.[13] Most of the out-of-court mediation services in Greater London offered their own mediators lectures, workshops, discussion groups, or consultation sessions on family mediation or related subjects on a monthly or bimonthly basis.[14] In-court mediators occasionally attended workshops, lectures, part-time courses given by the probation service or by other agencies on subjects collateral to mediation. At the time of the survey, few of Greater London's mediation practitioners had taken courses in mediation from either the Institute of Family Therapy or the Polytechnic of North London.

Greater London's educational programmes were not as effective as one might have hoped. In chapter 2 we learned that almost one-quarter of the practising mediators

12 See Appendix A-1, service 17. For discussion of the relevance of this theory, see chapters 3, 6, and 12.

13 For further particulars of the in-service mediation training programmes in Greater London in 1987 and 1988, see Appendix A-1.

14 For particulars, see Appendix A-1.

reported only limited formal instruction in mediation. We also discovered that the majority (60.3%) had had no opportunity to participate in an apprenticeship or period of supervised practice before beginning mediation practice. We might contrast this situation to the priority given to this subject by the practising mediators and family lawyers,[15] by the bulk of the mediation literature,[16] and by educators and practitioners elsewhere.[17]

Of the sixty-six practising mediators who commented18 on the adequacy of mediation training programmes in England, none considered the education and training programmes adequate. Comments such as the following were common:

> The training is very *ad hoc*. I honestly don't know what is going on. I was given some money for training and I didn't have anywhere to spend it. The North Poly[technic] has a course and I don't know much about it other than the organizers are very much involved in family therapy and so I think the course would probably reflect that. Most services run in-house training. The most thorough has been that organized by the Jewish Mediation Service.[19] They have adopted a very professional approach. The only problem with them is that they aren't yet getting enough referrals.[20] ... I'm sure that there is room for improvement. (out-of-court conciliator)
>
> Well, I think it is so piecemeal. The difficulty with conciliation in this country is that it is so piecemeal, with all the conciliation agencies operating. I doubt if there are two operating in precisely the same way.[21] ... The training is very piecemeal. (out-of-court conciliator)
>
> There is no training really. I have learned by doing it - which is a good way to learn - though I do wonder about all the mistakes I made at the beginning, before I learned the skills and techniques of dealing with people in this situation. (in-court conciliator)
>
> I can't remember getting much [training]. We learned as we went along. As far as tools we have little more than our experience, personality and character - both the court-welfare officers and registrars. (in-court

15 See chapter 2 and Table 11-1.

16 Most authors writing about divorce mediation suggest that it is preferrable, if possible, to include both formal education and supervised practice in the mediator's training.

17 J. Bercovitch, (1984): 53; Department of Justice (Canada), (1988c): 49; A. Elwork and M. Smucker (1988): 27; E. Koopman (1985a): 125; E. Koopman and J. Boskey; Vermont Law School (1987): 209-210.

18 A number of the practitioners declined comment or indicated their inability to answer.

19 Service 8, Appendix A-1.

20 The lack of referrals eventually closed this service, see Appendix A-1.

21 There appears to be some truth to this perception, see: chapter 3 and Appendix A-1.

conciliator)

> There hasn't been much training. We've all had to sort of feel our own way, and it is so wrong. (out-of-court conciliator)

Mediation services began to proliferate in Greater London before the education and training needs of mediators began to be addressed. There appeared to be an assumption that members of the collateral disciplines possessed all of the requisite skills:

> When the [mediation] scheme was set up in 1983, simply because we are court-welfare officers with social work qualifications, we were automatically felt eligible to do this [mediation]. We were as green as the registrars. (in-court conciliator)

As we have seen in chapters 9, 11, 12, and 13 this is clearly not the case. Greater London's mediators had found their existing professional skills inappropriate or difficult to apply:

> I'm not trained in conciliation, none of us are. We just muddle through. (in-court conciliator)

> Social work and probation training are good alternatives. They give some of the skills but, because it [mediation] is in its infancy, I don't think anyone has thought through what sort of training we are talking about. I don't see the person as a therapist, I don't even see them as being a counsellor. (out-of-court global mediation service consultant)

In chapters 2, 3, 5, 6, 9, 10, 11, and 12 we encountered the consequences of assuming that the skills of the collateral professions could be applied to mediation: the variety of mediation services, the lack of conflict-resolution expertise and legal training of mediators, the attempts of the mediators to emend skills learned in earlier professional training to suite mediation, and the interdisciplinary claims and confusions. Greater London's mediators were concerned, so were Greater London's family lawyers.[22] Let us examine now the practitioners' suggestions for improvement.

Institutional Responsibility For Training

Greater London's mediators[23] were divided in their recommendations concerning

22 See: L. Neilson (1990).

23 The family lawyers were not asked questions about the types of institutions that should provide training, or about course structures and teaching methods. The lawyers' suggestions were limited to duration.

institutional responsibility for mediation training. In **Table 14-1** we find the practitioners almost evenly divided into three groups. Equal numbers thought the formal theoretical and substantive parts of the mediator's training should be provided by academic institutions; by a national mediation association; and by local mediation services.

TABLE 14-1
Mediator Training: Academic, Institutional, Or Local?

A total of 97 practitioners commented on this issue. When a practitioner commented favourably on more than one option and did not express a preference, all answers were recorded.

Academic Institutions:	37	(34.6%)
Academic, correspondence course:	1	(0.9%)
National Training Centre:[24]	37	(34.6%)
Local, In-Service Training:[25]	32	(29.9%)
Total number of suggestions:		107
Total number of practitioners commenting:		97

Table 14-1 tells us that many mediators considered academic institutions the best place to learn the formal part of the mediator's training. This does not mean, however, that all thirty-seven were in favour of educating mediators at the university level. In fact ten specifically stated that they did not think university level training appropriate. These practitioners worried that universities would use the wrong criteria - academic rather than personal - for entrance and exit. Another ten expressed a preference for training in universities. The remainder appeared willing to consider a range of academic options. The majority of the practitioners who favoured the use of academic institutions for the formal, substantive part of mediation training included in

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24 Many of these practitioners also suggested the need to include a local in-service component in the mediator's training to include training specific to the ethnic/cultural needs of the community.

25 Some of these practitioners thought the broad outline of the training programmes should be developed nationally, but all thought the bulk of the mediator's training, both academic and practical should be provided at the local, in-service level.

their suggestions a local, in-service apprenticeship component.

The few who advocated training in universities and polytechnics argued that the participation of academic institutions would bring to mediation a needed degree of acceptability and respect:

> I would go for a national, professional scheme [which is] constantly monitored and updated so you don't have idiosyncrasies. I am a pro-qualification person - because you maintain a standard. ... So I would prefer university. .. It is really a matter of whether conciliation is going to make itself a profession or not. ... I would always go for high standards. You would get more credibility. It seems to me that you have to be qualified to be recognized. You need to do it properly. A qualification which is not really respected would be worse [than none]. (out-of-court conciliator)
>
> Ideally it would be good to have a national organization set up with affiliates in the colleges. That would give us the professional status we do not have. (out-of-court conciliator) [26]

E. Koopman[27] argues that training in academic institutions, particularly at the university level, would help to ensure educational quality control as well as to integrate mediation research with practical training.

Other Greater London mediators were skeptical, however, of the suitability of university-level training. They argued:

> Marriage Guidance have a good training programme. You need a good liaison with the courts. ... I don't like the idea of polytechnics and colleges. They would put people off. You don't need those sorts of skills. You would put off people who don't have A levels - otherwise you end up only with social-workers, solicitors and marriage counsellors. If you want to widen it you have got to have grass-roots-level training. (in-court conciliator)
>
> #1: I wouldn't want to go back to university. #2: I wouldn't choose university [for the mediator's training]. It is predisposed to younger people and I think there is one thing about mediation: one thing it needs is people with life experience. (two out-of-court conciliators)
>
> People talk about the national body and how it tells them how to do things. I think [I would prefer it if the] national body provided the training and selection, if locally there was leeway for idiosyncrasies and variety. ... Conciliation has nothing to do with academic ability so I would think it would be very off-putting to have [training] linked with a

26 For discussion of the professionalization of mediation, see chapter 10.

27 E. Koopman (1985a): 131.

university. (out-of-court conciliator)

Another thirty-seven mediators suggested that training should be done at the national level, by a national association such as NFCC. These mediators offered three arguments in support of their view: the need to upgrade mediation's educational requirements; the need for standardization of mediation practices; and a need for quality control. They argued:

> The National Marriage Guidance model - of having a national training centre where people could go for residential training, for day seminars with tutors, [and which would] also be responsible for [the mediation] programme in the UK, for laying out workshops and the local training, but having a central base for residential training and keeping people up to date with the literature. [And it would be responsible for] the development of a national model, or maybe two or three models and you wouldn't move outside of that. ... It could be done through the national body, with recruitment based on personality type. Then you would be looking at three years of training - which would include practical placement with different organizations already in the field. .. And then I would restrict the number .. in the field to a few key services, which would be of high [quality] and backed up by a highly trained staff. Perhaps only two in London. But that would be better than trying to have too many locally. It would be better to have a network of high quality centres, with highly skilled people. But as it is now, .. we are not very good in the way we are developing and in time it will just add to the dilution and the death of the process. ... I would be looking for people with personal qualities and with life experience. I would not be looking for academic qualifications. And then I would put them into training for three years. (out-of-court conciliator)

Those who were opposed to training at the national level were concerned about people using the national association to seize control of the mediation movement, or about there not being enough expertise outside of the universities to teach the subject properly, or about the national organization possibly exercising dictatorial control.

Another thirty-two thought that mediators should be trained at the local level.[28] They argued that different socioeconomic and ethnic communities have different needs, for example:

> I would see it under an umbrella ... to set ethical principles, but having got those basic principles, I would allow a large amount of flexibility and

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28 Five of those who recommended local training also said that they thought mediator education could be provided by academic institutions.

> variation in local boroughs, have it geared to the local community ... If I were setting up a scheme in a predominantly Indian community, it would obviously be a very different scheme from one operating in a middle class London suburb. We have a Jewish scheme operating and their concerns are different ... So there must be room for local variation to meet the consumer need. (out-of-court conciliator)

Or they argued that the use of local professionals in local training could help boost referral rates, for example:

> [Local training] has the advantage that it would enable [the new mediators] to establish contacts and to develop a comraderie; to establish common work practices in [their] own area; and also to draw upon local talent which would build up the referral structure. ... I think on the job training with someone taking a leading role ... a combination of straight information input, lectures, and the practical. I can't see any way around it. (out-of-court conciliator)

Finally, they argued that training at the local level would make training available to those without other qualifications:

> To go back to your first question: can anyone do it? Yes, anyone with the personal attributes and skills. I don't think you need degrees or to be particularly clever ... It has to be available for people who are not qualified. I wouldn't want to see prerequisites like 2 'O levels' and 'A levels' or whatever - so not universities or colleges. Before entering training they would need to have demonstrated broadly that they have some of these skills. They could be in industry, could be a youth club leader - some conflict and communication ability. It needs to be fairly local. (in-court conciliator)

Only fifteen mediators, however, thought that guidelines for the content of the educational programmes should be developed locally. The vast majority (83 out of the 98 who commented on the issue) said that the broad parameters and standards for educational programmes should be developed nationally (74) or by academic institutions (9).

Those who were opposed to local training were worried about quality control, about different centres developing different practices, and about potential problems with 'professional' development and self-criticism:

> I wouldn't want to set up any training scheme locally, because then you would get what we already have now: groups of people all doing it differently. (out-of-court conciliator)

> I wouldn't hook into private agencies for training. They are privately

> funded and with that funding comes an ideological position which is sometimes detrimental to a generic approach. (out-of-court conciliator)

Chapter 3 and Appendix A-1 tell us that these mediators' concerns have some legitimacy.

The practitioners offered benefits and drawbacks for each option: academic institutions offer status and legitimacy, but could limit training to the wrong types of people; national training programmes would be difficult to establish because of the need to gain consensus about the best mediation model(s); local training could be tailored to meet local needs and could be made accessible to a broad cross-section of the public, but could produce unacceptable variation in mediator competency and style of practice. Perhaps it is not advisable to attempt to reconcile the practitioner's views at this time. Perhaps, if the dangers of each type of programme are kept in mind and efforts are made to overcome them, it will not matter where mediation training is provided - although it must be acknowledged that the national and academic proposals do appear to offer better quality control than the local training option.

Earlier we mentioned that most practitioners considered it imperative for the mediator to have some apprenticeship or supervised practice in their training. The majority of Greater London's mediators suggested that students receive this portion of their training in local mediation services.[29] Perhaps providing practice supervision or apprenticeship programmes, and possibly selecting candidates for mediation training, are the most appropriate educational functions for practising mediators and mediation services.

Duration Of Mediation Training

Let us turn now to the issue of duration and **Table 14-2.** Not surprisingly, there was a direct relationship between the occupational background of the proposed mediation

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29 We shall discuss the practitioners' proposals for apprenticeship training in more detail shortly.

students and the duration of training the practitioners recommended.[30] The mediators' suggestions have, therefore, been divided into three occupational groupings: proposed training for those with mental health, or social-work and related backgrounds, including family therapists and counsellors; training for those with some related occupational experience, although not necessarily from the mental-health and social-work fields (including lawyers); and training for everyone, including lay entrants. For purposes of analysis the mediators' suggestions have been placed in specific categories closest to the suggestions offered.

TABLE 14-2
Practitioner Proposals For The Duration Of Training Programmes For Mediators By Occupational Background Of Entrant

Introduction

Ninety-five mediators made recommendations on duration. When a practitioner made several recommendations, i.e. specified a particular training period for social workers and another training period for lay entrants, both proposals have been recorded.

The practising mediators were not given suggested categories to choose from. Consequently they offered a multitude of suggestions. Some gave answers for full time study, others for part-time study. Many suggested a block of full-time study at the beginning of training followed by a part-time study programme interspersed with supervised mediation practice for the duration of the proposed training period. Some thought only of academic or classroom time when they recommended a period of training, others included a practice component. The mediators' suggestions for each category of entrant are, therefore, shown in two tables: one for the duration of classroom study only, and another for classroom or academic study and a supervised practice component.

For purposes of analysis and comparison, the mediators' answers have been placed as closely as possible in the time categories offered to the family-lawyers in their questionnaires.[31] While some of the detail of the mediators' proposals has thus been lost, analysis and comparison of the mediators' proposals with those of the family lawyers is made possible.

30 See also: E. Koopman (1984): 13.

31 See Appendix A-1.

TABLE 14-2
Proposed Durations Of Mediation Training Programmes By Occupational Background Of Entrant [32]

	Mental Health 'Professionals'[33]		Related Occupations All Types	
	Classroom Only	With Practice	Classroom Only	With Practice
3 to 4 days (40 hours or less)	43.5%(10)	5% (1)	13.5%(5)	0
3 months, 3 hours per week	0	5% (1)	5.4% (2)	3.0% (1)
6 months, 3 hours per week	34.8%(8)	25% (5)	21.6% (8)	18.2% (6)
12 months, 3 hours per week	13.0%(3)	25% (5)	24.3% (9)	24.2% (8)
2 years, 3 hours per week	4.3%(1)	35% (7)	21.6% (8)	36.4% (12)
1 plus years, under-graduate, full time	0	0	2.7% (1)	6.1% (2)
1 year, graduate full time	4.3%(1)	5% (1)	10.8% (4)	12.1% (4)
TOTAL:	(23)	(20)	(37)	(33)

32 The mediators were asked to assume they had been given all the financial resources they would need to develop any programme they wished. In spite of this request, some of the practitioners insisted on considering the 'financial realities' of government and private funding. The requested assumption does mean, however, that considerations of cost did not play as large a part in the practitioners' responses as they might have otherwise.

33 Most practitioners included here: social workers, psychologists, family therapists, marriage guidance counsellors, and court-welfare officers.

TABLE 14-1, Duration of Mediator Training By Occupational Background, continued

Lay Mediation Students

	Classroom Only	With Practice
3 to 4 days, 3 hours per week	1.5% (1)	0
3 months, 3 hours per week	16.9% (11)	1.7% (1)
6 months, 3 hours per week	18.5% (12)	16.7% (10)
12 months, 3 hours per week	33.8% (22)	36.7% (22)
2 years, 3 hours per week	12.8% (8)	25.0% (15)
1 plus years, under-graduate, full-time	16.9% (11)	20.0% (12)
1 year, post-graduate, full-time	0	0
TOTAL:	(65)	(60)

We see that, if we take formal training and apprenticeship together, the mediators' suggestions for the duration of mediation training cluster around one- and two-year, 3 hours-per-week course lengths. Even if we look solely at classroom time, the mediators suggest a 12-month course for those with lay and non-mental-health backgrounds. Mediators who specified training for beginning mediators from the social-work/mental-health disciplines[34] tended to suggest courses of shorter duration, for example of the workshop, 40-hour, or 6-month-part-time variety. It is important to realize, however, that most of the mediators did not separate these disciplines from the others and therefore proposed including these students in lengthier courses along with members of other disciplines, and/or along with lay students. It is also important to

34 Many of those who gave durations specific to social-work, counselling, and mental-health students sought to restrict mediation to people from those disciplines. Others had one suggestion on duration for this group of students, and another for students with no related experience or from other disciplines.

recall that almost all of the practitioners had social-work, counselling, or therapeutic backgrounds. Perhaps people naturally assume that they, themselves, need less training than others need. Certainly the mediation training that Greater London's family lawyers recommended for themselves was of shorter duration than the courses they recommended for others.[35]

When Greater London's SFLA members were asked about the educational requirements that lawyers should meet before attempting to provide mediation, the length of training they proposed was considerably shorter than that proposed for people not legally trained. The majority, 68.1%, of the 138 lawyers who answered the question and felt that lawyers should mediate at least some issues, suggested at least a three-month, three hour-per-week course requirement. The minimum requirements suggested were as follows: no additional training needed, 6.5%; a three-day course, 20.3%; a three-month, three-hours-per-week course, 23.2%; a six-month, three-hours-per-week course, 27.5%; a graduate level, one-year-full-time course, 16.7%; and other, 5.8%.[36] While, as we shall see, the lawyers proposed far shorter courses for themselves than they did for others, it is noteworthy that only nine solicitors, or 6.4%, considered lawyers competent to engage in mediation without further training.

As we evaluate the practising mediators' educational proposals in **Table 14-2** and compare those to the lawyers' proposals, it will be necessary to recall that many of the former were considering only child mediation when offering educational suggestions. In chapter 7 we learned that only one of the fourteen practitioners who sought to limit the practice of mediation to those from the counselling, social-work, and mental-health fields was considering global mediation when making the comment. We also learned that a substantial number of the mediators were opposed to global mediation, or thought

35 The family lawyers' questionnaire responses we shall be discussing in this chapter first appeared in: L. Neilson (1990).

36 Answers given by those in the 'other' category were: the need for practical experience (6); a one- to two-year course meeting three hours per week (1); and one respondent simply stated 'a longish course'.

that the service should be provided by lawyers. The practising mediators' proposals for the education and training of mediators in **Table 14-2** are remarkably similar to the suggestions of family-lawyers for the education and training of those who would mediate only child issues as follows:

TABLE 14-3
Family Lawyers' Views of the Training Needed to Mediate Family Law Disputes About Children

	Number	Percentage
No training required:	1	0.7%
Three to four-full-day (18-24 hour)	1	0.7%
Three months, 3 hours-per-week	20	14.3%
Six months, 3 hours-per-week	26	18.6%
Twelve month, 3 hours-per-week	35	25.0%
Two year, 3 hours-per-week	15	10.7%
One year, full-time, graduate	34	24.3%
Two year, full-time, non-graduate	1	0.7%
Other:	7	5.0%[37]
Total:	140[38]	100%

It is apparent that both the mediation and family-law practitioners considered the majority of training programmes currently available to mediators (most of which are of the workshop to 40-hour variety[39]) inadequate even for those who would limit mediation to disputes over the care of children. The majority of both the family lawyers and the practising mediators suggest that those who wish to practice child mediation receive a minimum of 120 hours of training over the course of a one-year, three hours-per-week programme.

The practitioners' proposals for educating mediators to do global mediation were even more rigorous. If we consider only the suggestions of those mediation

37 Five percent created their own categories, namely: practical training, the need for practical experience in family work, a three- to four-day course plus apprenticeship, and a three-to-four month, full-time course.

38 Five did not answer and 7 checked 'unknown'.

39 For discussions about the state of mediator education and the availability of training programmes, see, inter alia: D. Brown (1982); K. Dutenhaver (1988): 3-11; Family Mediation Canada (1990); Family Mediators Association (England) Training; J. Forster (1982); S. C. Grebe (1988): 13-26; National Family Conciliation Council (1988a); North London Polytechnic, Mediation course outline, pamphlet; J. Pearson and N. Theonnes (1988a): 90.

practitioners who either regularly practised global mediation or who expressly considered global mediation when offering their recommendations, we find the largest group of mediators recommending training programmes of 2 years' (three-hours-per-week) duration. The family lawyers tended to suggest graduate-level, full-time training programmes. As we see in **Table 14-4**[40] again the lawyers' and the mediators' course proposals were similar.

TABLE 14-4
Mediator and Family Lawyer Views of the Training Needed to Practice Global Mediation, a Comparison

	Mediators Number(Percentage)	**Family Lawyers** Number(Percentage)
- No training:	0 (0.0%)	0 (0.0%)
- three to four day workshop:	1 (4.8%)	1 (0.7%)
- apprenticeship, on-the-job:	0 (0.0%)	1 (0.7%)
- 3 months, 3 hours-per-week:	0 (0.0%)	6 (4.3%)
- 6 months, 3 hours-per-week:	1 (4.8%)	11 (7.9%)
- 12 months, 3 hours-per-week:	3 (14.3%)	23 (16.5%)
- 2 years, 3 hours-per-week:	9 (42.9%)	15 (10.8%)
- 1 year, full-time, non- graduate:	3 (14.3%)	0 (0.0%)
- 1 year, full-time, graduate:	2 (9.5%)	44 (31.7%)
- 2 year, full-time, graduate:	0 (0.0%)	1 (0.7%)
- 3 years:	2 (9.5%)	0 (0.0%)
- Need law degree and/or practical experience in family law:	0 (0.0%)	37 (26.6%)
Total:	21 (100.1)	139 (99.9)

Table 14-4 tells us that forty-five[41] of the family lawyers suggested the need for graduate level training for those who would practice financial and property as well as child mediation. We should note that the graduate-level course was phrased so as to apply to lawyers as well as to members of other disciplines. It appears that many of the lawyers would require other lawyers to have graduate-level training before beginning to offer mediation. When a similar question was limited to the training that should be

40 The mediators' proposals have not been divided by occupational background in this section as the numbers do not warrant division. Again, the mediators' proposals have been slotted into the closest category offered to the family lawyers in their questionnaires. See the introduction to Table 14-2.

41 Another lawyer specified the graduate course but would have limited entrance to lawyers. That answer was included in 'only lawyers' rather than in the graduate course category.

required of lawyers, 16.7% (23) of the family lawyers continued to opt for graduate-level, full-time mediation training programmes. It is of interest that only slightly more than one-quarter of the lawyers sought to limit global mediation to lawyers - given stringent educational and training requirements for others. This suggests that the lawyers' educational concerns about mediation were indeed educational and not expressed merely for the purposes of protecting the legal profession's access to family-law clients. While the majority of the lawyers did not recommend limiting financial and property mediation to lawyers, they did suggest the need for one-year, graduate-level training programmes to give others the necessary knowledge and expertise. In essence the mediators with global mediation experience agreed. Most suggested educational programmes of similar duration.

The practising mediators' criticisms of their own educational preparation to practice mediation, their use of tools drawn from other disciplines, their uncertainties about their own abilities to handle global mediation, and the practising lawyers' and mediators' mutual concerns about the education and training of mediators, all suggest the credibility of the practitioners' educational recommendations. While the levels of expertise and training that the practitioners suggest could be expected to have an impact upon the cost of providing mediation, it is likely that highly trained mediators would be more effective than those without adequate training. If mediation is to become an effective alternative to the adversarial process, the mediators who provide the service will need to be highly skilled - as highly skilled as those involved in the adversarial process. Perhaps the lackluster performance of mediation against the adversarial system displayed in the Newcastle Report[42] reflects a need for further education and training of mediators rather than inadequacies in the mediation process. One hopes that cost considerations do not lead to a reliance on services which are not equipped to handle

42 University of Newcastle Upon Tyne (1989): 202-256 (see: Report of the Conciliation Project Unit).

that which is required of them.

Lawyers In Mediation

In chapters 7 and 13 we discussed the possibility of training lawyers to provide global mediation or of teaching them to co-mediate with members of the mental-health disciplines. We noted that the combination of professionals might help to reduce the substantive knowledge required of individual mediators. In chapters 8, 9, and 11, however, we learned that co-professional mediation is unlikely in itself, to be the answer. It appears that members of both disciplines will also need basic mediation training in order to acquire core mediation skills in non-directive conflict resolution. In chapter 7 we learned that the majority Greater London's mediators were prepared to welcome at least some lawyers into mediation. We discussed the mediators' reservations and conditions in chapters 8 and 9. What were Greater London's family lawyers' thoughts about practising mediation?[43]

Only 2.1%, of the 141 SFLA members in Greater London who responded to the issue, thought that lawyers should not be involved in mediation. A further 12.8% thought they should not mediate child issues.[44] The solicitors were asked what issues lawyers should mediate if they were to provide mediation. The overwhelming majority (81.6% of the 152 respondents) thought lawyers should mediate all issues. 14.5% said that lawyers should limit their mediation services to property and financial issues.[45] 2.0% would limit lawyers to mediation of child issues.[46]

We already know that very few (6.4%) of the responding SFLA solicitors thought lawyers should begin to practice mediation without further training. Several

43 Again, much of the material that follows first appeared in: L. Neilson (1990).

44 When a further question on this issue was asked, 22 said that lawyers should limit any mediation practice to financial and property issues. This discrepancy can either by explained by the opportunity to add educational requirements to answers given within this question or by the fact the other question had 11 more respondents.

45 See comments in footnote 44.

46 From other answers given to other questions, it was clear that these two respondents did not favour mediation of property and financial issues by anyone.

respondents, when asked about lawyers in mediation, spontaneously offered their opinion that they did not think lawyers should mediate child issues without the assistance of a mental health or behavioral-science professional. Others were of the opinion that lawyers should have additional education and training before doing so. In chapter 9 we learned that, while the SFLA members were confident that lawyers had the basic education necessary to handle property and financial disputes, they were less sure about lawyers' competence to handle legal disputes relating to children. It appears, therefore, that lawyers should engage in the solo practice of child mediation with caution. This study suggests that they would first need to heed the mediators' comments - discussed in chapters 8 and 9 - about the need for lawyers to change from controlling but protective experts into supportive facilitators, and the need for them to acquire the knowledge and skills identified in chapters 11 and 12.

Some researchers have found lawyers uninterested in practising mediation.[47] This was not the case among SFLA respondents, probably partly because many SFLA members profess an interest in non-adversarial approaches to family law.[48] Half (49.7%) of the 147 who addressed the issue indicated they definitely or probably would provide mediation services if the Law Society should give its permission. Another 27.2% indicated they might possibly do so. Only 23.8% said they would probably not or definitely not provide family-mediation services and several of these indicated that the only reason they would not do so was because of anticipated opposition from partners or employers. While some caution should be exercised in expanding these percentages to other groups of lawyers, since it is entirely possible that the solicitors who returned the questionnaire were those most interested in mediation, the responses do indicate a great deal of interest among certain groups of family lawyers - at least in Greater London - in mediation practice. The results of the surveys of both the lawyers and the mediators

47 Department of Justice, Canada, *(1988a):* 188.

48 See chapters 1 and 2.

support the feasibility - subject to longer periods of education and training - of the Family Mediators Association's model of teaming family lawyers and mental-health professionals to provide global mediation.[49]

Course Structure

We have already noted that most of the practitioners suggested a period of apprenticeship or a period of supervised practice in the mediator's training. Almost without exception, the mediators[50] commented that one can only learn mediation by doing mediation. We shall recall that many of Greater London's mediators learned mediation by doing it rather than in formal training programmes.[51] This may have predisposed some to emphasize the importance of experiential learning. For example:

> (*Do you have any comment on the best methods to teach mediation?*) By doing it - because that was my baptism. It certainly helps to work with colleagues because we all have a slightly different approach. ... I have attended some training courses but most [of my learning] has been from the practical experience of doing it. But then we are talking about different stages of the idea. There are a lot of us who came in in the early stages and we sort of just evolved. (in-court conciliator)

The importance of supervised mediation practice or an apprenticeship was also emphasized, however, by Greater London's SFLA lawyers and is also emphasized in the mediation literature.[52]

The few mediators who gave supervised practice or apprenticeship a moderate or low ranking suggested that those with a 'professional' background and some

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49 In 1989 the members of an experimental global mediation service in England, 'Solicitors In Mediation' (see Appendix A-1, service 11) helped to form a national body called the 'Family Mediators Association' (FMA). The association was formed for lawyers and mental-health professionals who wished to provide global mediation services together. Members of the Association who wish to become accredited FMA mediators, are expected to complete the Association's 5 day - plus supervised practice - mediation training programme (Family Mediators Association [England], FMA Training Course, London, June 1989 [leaflet]; L. Parkinson (1990c): 10-11). This study indicates the feasibility of FMA's model but also the limitations of its training programme. It now appears unlikely that a 5 day training programme could enable FMA's graduates to replace their traditional 'professional' methods (counselling, family therapy and adversarial negotiation) with other conflict-resolution methods that better enhance disputant autonomy.

50 The lawyers were not asked to comment on course structures or methods of instruction.

51 See chapters 2 and 11.

52 See footnotes 15, 16 and 17.

additional formal training should simply begin to practice mediation. Others were thinking of apprenticeship in terms of having students learn by observing actual mediation sessions and were concerned about the effect this would have on disputants; for example:

> I'm not too happy with [trainees] sitting in on sessions. Although I'm not too keen on it myself, I think role play has more value in these situations. Neither do I like people being used as specimens. I think role play would be better. (in-court conciliator)

Many (28) of the mediators did in fact suggest that mediation students observe a number of live mediation sessions as part of their apprenticeship. Others, although they endorsed the need for beginners to spend some time mediating with experienced mediators, shared the concerns of the same in-court conciliator quoted above:

> [Apprenticeship] is very important. How can you learn without doing it? But we have had difficulty with observers. You say, 'Do you mind? This person is an observer', and the people generally say, 'Oh, I don't mind' because they don't want to hurt you ... The person observing may think they are not participating, but that person is the most forceful thing in the room. To the clients I'm sure that is off-putting ... So although it is important that they get their training, I don't like them sitting in, observing. What I have had is someone who took the role of the conciliator and yet wasn't a conciliator. And I said beforehand - they were already professionals - and I said [to the person in the role of conciliator], 'Look if you want to comment, then do' ... And having them act as a conciliator was better for them, it was better for me - I introduced them [to the disputants] for what they were. (out-of-court conciliator)

The solution would appear to be to simulate, in the formal portion of the mediator's training, situations designed to place students in positions resembling those that they would face as mediators. During their apprenticeship period or practicum, the mediation students could then co-mediate with experienced mediators, moving from limited to full participation as they gained experience.

The practising mediators also offered a number of suggestions for course structure. The majority suggested mixing the formal mediation training with supervised mediation practice. The following are some examples of their suggestions:

> The only way to develop expertise is to do it. On-going training is quite

> good - after working - to come back and have something to feed back into training. .. [You need] a section of training and then sitting in and apprenticeship. ... I think two evenings a week. [If you were] doing it full-time you could condense it. You would, I would hope, cover quite a lot in three months daily of [formal] training and sitting in. (out-of-court conciliator)
>
> (*What would you propose on length?*) Nine months for the first bit and then - I don't think you want to cut corners on it. We are playing at it really and this concerns me, because it is something that could be of great value to people ... and could gain some status in political circles ... but it needs to be done properly and not played at like a 6-week debutant-cordon-bleu course. That worries me, because it can so easily be ridiculed as a new idea and passed over. (*So you would make it a nine month core programme and then evaluation?*) I think so. ... (*When you say nine months, do you mean full time, part time?*) I would say, if at all possible, full time but there again you would have to adapt that - but that time span. Because if we are talking about all those [subjects discussed in the interview], then you can't do it in a 6 weeks course. Towards the end you would be doing your practical and then going back for refreshers. (in-court conciliator)
>
> I would prefer that is was done by professionally qualified social-workers, because it is such an important piece of work. ... (*So you would be looking at a graduate level course?*) Yes, I think a 6 month course you could do after - (*Including practice?*) Oh yes, you need to have both. It would have to link up with existing agencies for placement. (out-of-court conciliator)
>
> #1: It is best done with an initial week and then experience and then some more training and more experience. .. [It needs] on going training in stages, .. rather than saying one year's training - because I don't think you have a hope of learning without getting in and making mistakes and learning from experience. #2: Yes, I would actually think about beginning with a fairly intensive input ... Stagger it maybe with large inputs periodically. I would think a large in-put at the beginning and training on an ongoing basis, a bit like social-work training: in college a couple of days a week and in the field a couple of days per week, with both together ... [It should be] extensive at the beginning: 2 to 3 weeks to a month full-time, if you are going to include the developmental needs of children and so on - at least one month, and then maybe a day a week. #1: For a year or two and then forever after you would pick up a day's training or conference once or twice a year - to keep up. [You need] experiential [teaching]. The things people remember are always experiential. (two in-court conciliators)

As we have seen, two mediators expected this training process to take as long as three years.

Some of the mediators suggested the establishment of training modules so that students could take only those subjects in which they were weak, for example:

> [You need] three course levels. Yes, I think 20 modules. If you are a lawyer, you would have to do the social-work and the psychological modules. If you are a social-worker or psychologist you would be required to do the legal modules and if neither, to do both. Everyone would be expected to do the core [course]. (out-of-court conciliator)
>
> You'd have to split the lawyers and conciliators to a certain extent, because an experienced lawyer doesn't want to sit through 4 lectures of detailed property and finance because they already have that. But from my experience of conciliation at the moment, [I would say] both lawyers and conciliators are going to need everything else. The difficulty is going to be to train the conciliators in finance ... You know from practice. If a client comes to me and says, 'What do you think?', I will say, 'I think this is the kind of order the court is going to make, this is the sort of thing the court will do'. [That opinion is given] from my experience as a matrimonial lawyer doing nothing else over 9 years ... It is not from anything I've read. If that same client said to my newly qualified assistant, 'What do you think?', she might be able to make a stab at it but she wouldn't have any experience on which to base it - and that is the trouble with trying to teach conciliators ... My concern is with conciliators who want to be mediators. Where are they going to get that experience? (out-of-court mediator) [53]

The problem that comes immediately to mind, one which was implied by the out-of-court mediator, is the potential loss, with the separation of the disciplines, of cross-disciplinary fertilization. It might be better to have family lawyers attend the legal training to share perspectives and experiences with the non-lawyer students, and to have the mental-health and social-work professionals attend the social-work/mental-health portions of the course for the same reasons. The 'module model' does offer the possibility, however, of compressing the course for those members of the collateral professions wishing to take time from existing professional practices for training.

Let us look briefly now at some of the training methods suggested by the mediators.

Training Methods

All of the practitioners - lawyers and mediators - were in agreement about the importance of blending formal training with practical experience. The mediators did

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53 Mediators with a great deal of experience working with families or children as social-workers, therapists or counsellors, probably had similar concerns about lawyers, given the practitioners' emphasis on practical as opposed to theoretical knowledge.

not agree, however, on the type of formal training that they considered appropriate.

Some stressed the importance of academic content:

> More and more I'm coming to realize that you need academic input to be able to conceptualize and grasp different theories and hold them in your head. Without that ability you actually are in danger of becoming one dimensional, and then there is a tendency to feel frightened and threatened and to hold onto one school of thought. And that is where the sadness comes in, because the people who are coming to [mediation] have different needs. (out-of-court conciliator)

Others were opposed to including an academic component:

> Training for me has to be role play and actively doing the job as second in command, rather than a lot of reading. I wouldn't advocate an academic type of course for conciliators at all, because at the end of the day they don't need to know. They need skills and techniques in dealing with various situations ... [They] don't need child care knowledge. You could take someone from industry who has been good at resolving conflict there. [He] may well be better. I don't see it as a specific social-work skill and there is no reason that it has to be restricted to social work issues ... There is a certain amount of basic information you can only get by lectures and hand-outs, for example custody and access law - I have never been sure what is gained by lectures over hand-outs. I would have hand-outs on all the factual information and then concentrate the course on role play and communication skills, practising, and some discussion of various techniques for resolving conflict. Mostly the time would be spent seeing what it is like to be a conciliator. (in-court conciliator)

> I'm not very good - I'm not very intellectual. I switch off after 15 minutes or so. I have a short concentration if I am being talked at. I learn much more quickly if I am involved in the doing. (out-of-court conciliator)

> But to have someone lecture you in that is not very helpful. I think you have got to be more involved in the process of learning than just listening. So active workshops in family work would be strongly encouraged: 10% didactic and 90% experiential. (out-of-court conciliator)

Many mediators argued that academic achievement has nothing to do with the ability to mediate. Twenty-one practitioners made this comment without solicitation. For example:

> The most important thing is selection and the type of person ... So I wouldn't say any particular education ... When it comes down to actually finding something that needs a helping, caring but firm and not mollycoddling [person], it has nothing to do with education or in many respects intellectual [ability]. (out-of-court conciliator)

> I would not be looking for academics. I would take bus drivers. I would, actually. I would be looking for people with personal qualities and life experience. I would not be looking for academic qualifications. (out-of-court conciliator)

> #1: [I would be looking for] common sense first and foremost. #2: How do you evaluate common sense? #1: I don't think you need an academic background to be a good conciliator. I can think of some woman down my street who could conciliate with the best of people, because [she is] blessed with common sense and a sense of fair play - as long as they can read and write and communicate. (from joint interview with three in-court conciliators)

Substantially more mediators denigrated the importance of academic learning and stressed the importance of experiential learning, than did the reverse.

Perhaps academic forms of learning are indeed not relevant to learning mediation. Alternatively, perhaps this group of mediators was not academically inclined. Perhaps another group of mediators would view the situation differently. We did find, in chapter 2, that many of Greater London's mediators appeared to have had only limited academic training. It is also entirely possible that if one were to interview the practitioners of a wide variety of occupations and professions, one would always find the majority asserting the need to learn only the tools of their trade and how to apply them. If researchers were to compare the effectiveness of mediators having solid theoretical and substantive training to those having merely experiential and methodological training, we would be in a better position to assess the validity of the mediators' assertions. There is also another explanation for the practitioners' views. Perhaps the predominance of view that it is important only to learn the tools of the mediation trade is a reflection of the fact that mediation is a merely a method or an occupation, and not a profession. We learned in chapter 10 that the sociologists have identified a linkage between substantive knowledge, theory, and methodology as a necessary attribute of profession.

This study is unable to assess the validity (or lack thereof) of the mediators' claims. We can only note the apparent contradictions in the mediators' comments. If we think back to chapter 8 and the practitioners' comments about the personal qualities

needed by the mediator, we shall recall that a large number of the practitioners (24) mentioned the need for mediators to be good lateral thinkers; to have clarity of thought and a good memory; to be analytical, imaginative, creative, logical, quick thinking; and to have well developed abilities to solve problems and to concentrate. Even so, perhaps academic achievement and qualifications are not important. The mediators' comments as a whole suggest that interpersonal understanding, respect for others, and procedural knowledge are more important to mediation than are substantive knowledge or academic ability. Perhaps what is needed are students with high levels of intelligence, but not necessarily intelligence of the academic type. We might also ask if the 'intelligence' traits identified by the mediators were considered as important as interpersonal understanding, intuition, and respect for others. If one had the latter without the former, could one still be a good mediator? Are inter-personal skills essential and is intelligence only an asset?

The mediators suggested that different people learn by different methods: some by reading and listening, others by experiencing. Thus many of the practitioners suggested a combination of teaching methods:

> Role plays are very helpful. [You need] a balance of information giving followed by discussion, question and answer, and role plays. (out-of-court conciliator)
>
> You need more than an academic course. .. [It should be] more broadly based, with exercises. Not just a straight academic base, though you might need a chunk of the course [that would be] academic. (out-of-court conciliator)
>
> [You need] a mixture of things. You need some academic input, to deal with the legal things and to deal with the child psychology. You can role play interview techniques. You need some academic input. So I would see it as a mixture of academic and supervised practice, the two together. (out-of-court conciliator) [54]

In addition to lectures, the practitioners also mentioned other teaching methods they had

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54 Presumably students would also need to learn to analyze and evaluate the research and literature in the field and to explore the advantages and disadvantages of various mediation models and techniques.

found particularly helpful in their own formal training. Many proposed the use of role play: [55]

> Probably role play [is one of the best] ... [In my training the] role play was very interesting. We had a script based on actual cases, were assigned our roles. We did it in very small groups with an observer who wrote down where we went wrong and [where we] could improve. [We had] a small-group discussion afterwards about how each of us fit in our particular roles. (out-of-court conciliator)

Others were critical of role play or said they disliked it and did not learn from it:

> Role play is good in moderation, to illustrate a small point, but there is a danger in too much. [You have] everyone acting away. It is fun but [can be] quite dangerous and it is overused. (in-court conciliator)

> I don't like role plays and so on ... I just find it artificial. You find yourself getting into situations you would never dream of letting happen [in a real mediation session]. (in-court conciliator)

The practitioners also mentioned the importance of using actual cases (without identifying information) in discussions;[56] the helpfulness of communication exercises;[57] and the helpfulness of small-group discussions.[58] Also mentioned was the need to encourage the students to debate controversial issues:

> [In our course] we had a debate on whether or not to include children and we got them to argue and state the reason that they did not agree. We got involved in weighing up the pros and cons. In some circumstances it [appeared] bad and in some good. But the [most important] thing is to know when it is appropriate. (in-court conciliator)

Still others suggested direct but invisible observation of live mediation sessions. Ten suggested that students should observe live mediation sessions by video link or through two-way mirrors. Although these tools undoubtedly have potential for teaching, these practitioners were obviously not considering the problems associated with the use of this type of equipment, i.e., restraints on confidentiality and privilege, interference with families' rights to privacy, disputant discomfort, and restraints on free and frank

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55 See also, for example: E. Koopman (1985a): 118; L. Parkinson (1987a); S. Steir and N. Hamilton (1984): 715-6; P. Wehr (1979): 50.

56 See also: E. Koopman (1985a): 118.

57 See also: W. Donohue and D. Weider-Hatfield (1988): 315.

58 See also: E. Koopman (1985a); 118; L. Parkinson (1988a), (1987a): 150; P. Wehr (1979): 47-50.

discussions.[59] Presumably any mediator using these tools would need to gain fully informed and freely given consents to these observations from all family members. This is not to deny the usefulness of video equipment if used in other ways,[60] for example:

> Videos are useful, again if used constructively - not just sitting and looking at it, but stopping it and asking, 'What is going on?' And also to use videos of their [own] interviewing techniques and then to play it back to them. (in-court conciliator)

> I did a three day course of negotiation and it was wonderful. I have also done interviewing training using videos so you can see exactly what your face looks like and why you are not getting information from people, and how condescending you are being. (out-of-court conciliator)

All of these methods might be used at various points in the formal part of the mediator's training. They would give students some exposure to mediation before being exposed to clients. Adequate preparatory training would help to alleviate imbalances in the mediation process created when inexperienced mediators are teamed with experienced mediators during apprenticeship training.[61]

Continuing Mediator Training

Before we end our examination of the practitioners' proposals for training mediators in the future, we must consider the issue of continuing education. Almost without exception, (97% of the 92 who addressed the issue) the mediators said they thought it essential for practising mediators to engage in on-going training. Mediator trainers and educators elsewhere share this view.[62] Greater London's mediation practitioners offered a number of suggestions. Twenty-nine[63] suggested that mediators should have frequent opportunities to discuss difficult cases on an on-going basis with their peers or with a consultant. Twenty-two mentioned the need for periodic supervision of each mediator's

59 See also chapter 6.

60 See also: L. Parkinson (1988a), (1987a): 150; S. Steir and N. Hamilton (1984): 716-7; P. Wehr (1979): 47.

61 There is evidence to suggest that two experienced and even two inexperienced workers may be more effective than an experienced worker teamed with an inexperienced one: D. Hooper (1985): 281.

62 E. Koopman (1985a): 118.

63 All of the suggestions mentioned in this section were given spontaneously. Not all of those who ranked the need for on-going training as essential, offered additional comments.

practice by trainers from the national association. Others mentioned the need for periodic training seminars (16); for refresher courses at national or regional centres (14); for workshops (12); for ways for mediators to keep up with the current literature (9); for national mediation conferences (9); and for joint meetings among mediators to allow them to keep in touch with the practices of other mediation agencies (9).

Only fifteen commented on the amount of on-going training that should be expected. Their comments ranged from case discussions, seminars, or workshops on a monthly basis to yearly attendances at one- or two-day training courses. The suggestions most commonly offered were between twelve and seventy-two hours of on-going mediation training every year. These, however, were only recommendations. They were not proposed as minimum requirements. Associations in the United States require on-going training minimums of between twelve and eighteen hours per year.[64]

Discussion And Summary

None of Greater London's mediators considered the majority of the education and training programmes currently available to mediators adequate. Most were critical of their own educational preparation for family mediation. The mediators had found their pre-mediation skills, methods, techniques, and substantive education inadequate or inappropriate for mediation. The members of the Solicitors Family Law Association in Greater London shared the practising mediators' concerns. The family lawyers and the mediators alike suggested the need for considerable improvements in the education and training required of mediators - in the order of 120 hours of instruction over the course of one year for those who would limit their mediation to child issues, and a two-year-part-time[65] or one-year-full-time graduate course for those who would seek to practice

64 See, for example: L. Hack, (1987): 33; J. Lemmon (1983): 59.

65 As we've previously noted many of the practitioners suggested periods of full-time study. This would, of course, condense the total period of study. For example, the six months training course, or 72 hours of training, could be completed in 12 days, at 6 hours per day, on a full-time basis. Whether or not the two courses would be fully comparable, however, is questionable, given that part-time courses offer students more time to reflect and to devote time to assigned readings, exercises, projects, essays, and

global mediation. Generally, neither the mental-health mediators nor the family lawyers sought to exclude others from mediation practice, given further education and training requirements and subject to the need for all mediators to have the requisite personal qualities discussed in chapter 8.

In chapters 7 and 9 we explored the practising mediators' attitudes towards practising mediation with lawyers. We found considerable support for this proposition, subject to certain specified reservations. Here we found the lawyers reciprocating. The vast majority thought lawyers should be involved in all types of family mediation; most were willing to consider including mediation in their professional practices. The lawyers did not think, however, that family lawyers ought to engage in mediation without further training, and they were less sure of their own abilities to mediate child disputes than of their abilities to mediate property and financial matters. The education and training that the majority proposed for lawyers-cum-mediators was considerably shorter, however, than the training they proposed for non-lawyers. We observed a similar trend among those mediators who sought to limit mediation to members of their own disciplines.

A number of the practising mediators suggested the possibility of offering mediation courses in modules so that members of the collateral disciplines could take only those sections of the course in mediation unfamiliar to them. For example, the lawyers would omit the legal section and the mental-health practitioners the mental-health sections of the course. Members of both disciplines would be required to take the core mediation training.[66] We had some concerns about the loss to students of cross-disciplinary discussions posed by this model but noted the potential of a modular course to limit the time required of practising professionals for training. We should keep in mind, however, our finding in chapter 12 that the type of substantive

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practice between classes.

66 See chapter 11.

knowledge required for mediation is often qualitatively different from that required for other types of professional practice. Finally, we must keep in mind the central importance to mediation of non-directive dispute-resolution and the knowledge and skills that go with that. If conflict resolution knowledge is central to mediation, and substantive mental-health and legal knowledge secondary, we should not expect to find the deletion of one substantive subject area to substantially alter the length of training required.

The mediators and the lawyers both strongly recommended that a period of supervised practice be included in the mediator's training. Almost without exception, the practising mediators suggested the need to integrate formal instruction with supervised practice. Generally the mediation practitioners[67] preferred experiential to academic forms of learning. Many wanted mediators to be taught the tools of the mediation trade and considered theory and substantive knowledge unimportant. To a certain extent we can explain this perception in terms of the practising mediators' perceptions of the role of the mediator. In chapters 4, 5, and 6 we learned that mediators guide disputants in their own dispute resolution process without attempting to give them expert direction. Thus, we would expect to find mediators stressing the importance of procedural knowledge. The practitioners appeared, however, to carry their objections to academic forms of learning further. We wondered if this attitude reflected the practitioners' own educational shortcomings. We did notice in chapter 3 that many had had but limited academic training. Alternatively, we wondered if the practitioners' responses simply reflected the current state of mediation's development. Throughout this study we have noted the lack of common language; the incomplete transitions from disciplines of origin to mediation; and the mediators' continuing reliance on tools and ethics learned in previous disciplines. Together, these suggest the early stage of mediation's development in Greater London. It would be useful to know

67 The lawyers were not asked to address this issue.

if, in practice, mediation is at a similar stage in its 'professional' development elsewhere.

The mediators were almost equally divided in their opinions about the best institutions to offer the formal part of the mediator's training: some suggested academic institutions, others a national 'professional' association, yet others local mediation services. The alternative that commanded the most support was training by a national association. The practitioners were wary of universities and colleges because these were perceived to apply inappropriate entrance and exit requirements, and to use inappropriate teaching methods. They were concerned that training by the local mediation services would hinder the development of consistent standards. The vast majority of practitioners suggested, however, that local mediation services should be involved in the practical or apprenticeship part of the mediator's training, perhaps under the supervision of a national association or academic institution.

Finally, we explored with the practising mediators the importance of continuing mediator education. The vast majority stressed its importance. The practitioners offered numerous suggestions, most commonly the ongoing need for opportunities to discuss difficult cases with peers and consultants, and the need for periodic supervision, at the national level, of each mediator's style of practice.

CHAPTER 15

Discussion And Summary

Introduction

In this study we have explored the education and training required of family-law mediators and the professional obstacles to educational developments in the field. Of particular interest and concern were the inter-disciplinary disputes occurring within the emergent family-mediation discipline. We examined these issues, and related issues of existing mediator education, the attitudes of family lawyers and mediators towards one another, and mediation's professionalization process, through the eyes of those with experience in the field: the mediation and family-law practitioners. For the purposes of this study, the biases, perceptions, and understandings of the practising professionals were more important than were their actual practices, hence the study concentrated heavily on interview data. In addition, the information in this study was drawn from participant observation of mediation sessions, and from questionnaire data.

It became apparent during the course of the research that the term 'mediation' meant different things to mediators from different professional persuasions. While the majority of Greater London's practising mediators were providing, and thought mediators should provide, dispute- or conflict-resolution services, a minority appeared to be concentrating their energies on family therapy or on child protection. Thus, while the majority of the mediators emphasized the importance of disputant autonomy and decision-making, a minority envisioned their own role as that of expert healer of dysfunctional families or as expert protector of the interests and rights of children. The relative weights that the practitioners assigned to these views had a profound effect on

the type of mediation advocated and on the education and training considered necessary to provide the service.

These differences of perspective appeared to be at least partly due to deficits in the mediators' educational preparation for practice. None had the education and training that they recommended for others entering the field. The vast majority had mental-health or social-work backgrounds and were thus reasonably conversant with the psychological and social aspects of the divorce process, but they lacked legal and financial training as well as training in negotiation and conflict-resolution. The latter was of particular concern as the mediators identified non-directive conflict-resolution as the essence of mediation. Throughout the study we found the mediators uneasy about their own educational short-comings. The mediators were attempting to emend tools, methods, and perspectives learned in their earlier professional training to suite mediation and were finding the emendation process cumbersome and often inappropriate. Consequently they recommended substantial improvements in future education and training programmes.

In addition to different perspectives among the practising mediators we also encountered a difference in perspective between family lawyers and mediators. In particular, the lawyers appeared to perceive mediation as a more directive process than did the practising mediators. Thus, while the mediators tended to emphasize the importance of respecting the right of disputants to make their own decisions and the importance of mediators acquiring non-directive, procedural knowledge, the lawyers tended to emphasize the importance of substantive expertise, particularly in law. This is of some concern, since this study indicates that respect for disputant decision-making is fundamental to mediation. If lawyers' perspectives are uncorrected, we might expect lawyers engaged in mediation to deliver processes more akin to arbitration than to mediation.

The relative weights that the practitioners assigned to disputant autonomy and

the mediator as the knowledgeable expert, and to therapy and dispute- or conflict-resolution, were the most important divisions among the mediation perspectives. These divisions had far greater impact on the meaning of mediation as well as on the education and training needed to provide it, than the 'in-court' versus 'out-of-court' designations commonly used in England.[1] Researchers in England (see for example the *Newcastle Report* and the G. Davis et. al. studies) have commonly compared 'in-court' to 'out-of-court' mediation services, or services having close connections to the judiciary to those without close connections. This study suggests that practitioner attitudes towards disputant-autonomy, child advocacy, and therapy are as important as, or even more important than, court connections. If so, researchers must look at the effects of the former variables as well as the effects of court connections if they are to draw valid conclusions about the viability of different types of mediation services.

Profile Of Greater London's Mediators

Before we could begin to explore and evaluate mediators' and family lawyers' understandings of mediation and the education and training needed to provide it we first needed to know something about the practitioners. In chapter 2 we looked at the mediators' and lawyers' personal characteristics, their professional backgrounds, and their education and training. We discovered that the practice of mediation in Greater London was dominated by women, and by those fifty and older. These ages may seem surprising, but this is less so when we consider that most mediators worked part-time and many worked fully or partially on a volunteer basis.[2] Many were relatively new to the field.

We also looked at the backgrounds of the mediators: the breadth of their prior

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1 For example in the Newcastle Report. See also the R. Dingwall and D. Greatbatch studies, as reported in Family Law, Vol. 20 (1990): 410.

2 Many of the mediators worked for no remuneration, but were merely reimbursed for out of pocket expenses. Others worked for nominal fees. During the course of the study, however, the fees being paid to mediators were steadily increasing.

professional experiences; their academic backgrounds; their formal education and reading in selected subjects (counselling, psychotherapy, the psychological effects of marriage breakdown on family members, family systems theory, mediation[3] techniques, family law concerning stepparents; child law, law of spousal and child maintenance, law of property division after marriage breakdown); the duration of their mediation experiences; and the number of clients they had served in the previous year. Not surprisingly, we discovered that mental-health, social-work, and marriage-counselling 'professionals' dominated the field.[4] Many of the mediators had had many years of experience working in these disciplines before beginning mediation practice. At the time of this study very few were lawyers. Greater London's mediators tended to have fewer academic qualifications than family mediators elsewhere. In chapters 8, 9, 12 and 14 we found that the mediators expressed an aversion to academic forms of learning and to theories. We were not able to determine whether or not this perspective was a function of the mediation process and universal to mediators in general, or if it was a function of the educational attributes of this particular group of mediators.

When we examined, subject by subject, the mediators' training and reading, we saw that a substantial minority of the mediators lacked educational exposure in each subject. Of particular concern was the finding that a substantial minority of the practitioners lacked intermediate to high levels of training in mediation. Even more worrying was the finding that many of those lacking formal training in mediation had made little effort to familiarize themselves with the literature. It was also cause for concern that few of the mediators had more than a cursory amount of training in law, even in child law. The mediators' training in the legal financial and property fields was practically nonexistent.

When we looked at the professional backgrounds of the family lawyers we

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3 The term 'conciliation' rather than the term 'mediation' was used in the questionnaire.

4 Mediation elsewhere is also dominated by mental-health and social-work 'professionals'.

found that most specialized in family-law and had extensive professional experience in the field. The lawyers reported settling the majority of their family-law cases. Although the survey did not ask a direct question of the subject, we can safely assume that few of the lawyers had mediation (as opposed to negotiation) experience and that the majority did not have mental-health training or experience. Thus lawyers had legal and settlement expertise; the mediators, mental-health and some mediation expertise. The members of both disciplines lacked the expertise of the other.

Profile of Greater London's Mediation Services

In addition to gaining an appreciation of the educational and professional backgrounds upon which the practitioners based their opinions, it was important also to gain an understanding of the mediators' mediation experiences. In chapter 3 and in Appendix A-1, therefore, we looked at the family mediation services operating in Greater London in 1987 and 1988. We saw that services unconnected to the courts reported being heavily dependent on referrals from family lawyers[5] and that seven of these ten services reported having difficulty generating adequate numbers of clients. When we explored perceived connections between the lack of consumer demand for mediation and the referral practices of the family lawyers, we discovered that the majority of the surveyed family lawyers reported referring very few of their clients to out-of-court mediation services.[6] This might lead some to assume that the family lawyers were opposed to mediation. In fact the lawyers strongly endorsed the concept of mediation. It was the way mediation was being provided in practice that worried them. In particular, they claimed a reluctance on the part of their clients to use mediation. They expressed concerns about the effectiveness of the services, and they expressed reservations about the education and training of the practitioners.[7] We were

5 One service regularly offered global mediation but had no lawyers on staff. This service reported having few referrals from lawyers.

6 See: L. Neilson (1990).

7 Ibid.

not able to verify the validity of the first claim, but we do know, from the North American research, that many disputants when offered mediation refuse the service. We also know that many disputants, particularly those engaged in the divorce process, actually prefer a partisan, paternalistic, protective process. Perhaps family lawyers and family mediators ought to be serving different clients. Perhaps, instead of soliciting clients from lawyers, mediators ought to be concentrating their energies on attracting disputants who wish to use non-partisan, co-operative, non-directive processes instead of partisan, directive, but protective ones. This issue needs further study.

The family lawyers' concerns about the education and training of family mediators were substantiated by this study. In particular, the mediators were weak in law, finance, and dispute- or conflict-resolution. The study as a whole suggests the need for more stringent educational standards for mediators.

When we looked at the issues that the mediation services were handling, we found that they all mediated child issues. Three concentrated on access or visitation disputes. Only two regularly provided global mediation; three more did so occasionally. On an individual mediator basis, fifty-three practitioners indicated that they dealt exclusively with child issues; another eighteen were prepared to mediate financial or property disputes in principle but would leave final negotiations to the disputants' lawyers; another thirteen were prepared to mediate financial and property issues fully when those issues were closely connected to child issues. The other eighteen indicated a willingness to provide full global mediation.[8] Only eleven (10.8%) of the mediators had, at the time of this study, more than a minute amount of experience in financial and property mediation. Few, therefore, had experience on which to base their opinions about the education required for financial and property family-law mediation.

The mediators were very concerned about whether or not and how they should include children in the mediation process. Three of Greater London's mediation

8 It is interesting to note that only five of the latter group were lawyers.

services usually included children in mediation, five did so frequently, five did so occasionally, and three did so only rarely. We discussed the perceptions of the individual mediators about the advantages, disadvantages, and dangers of including children in mediation in chapter 5 and in Appendix A-1. Generally, the in-court mediators were more apt than out-of-court mediators to think it appropriate to include children, partly in order to allow children an opportunity to be heard, and partly in order to be able to use the children's' views to encourage settlement. The out-of-court mediators were divided in their opinions: some thought children's participation essential, others worried about the psychological effects of burdening children with weighty decisions in times of crisis. This study did not include a consumer component so we cannot draw firm conclusions about the effects of including children. It did become apparent during the course of this study, however, that including children in side sessions, apart from their parents, was particularly troublesome. While both the in- and out-of-court services used this method, the problem appeared particularly acute in court.

None of the courts in Greater London provided facilities for children: children waited in the halls outside the court-rooms or in bare, stark, waiting rooms while lawyers and tense, upset, and sometimes crying adults milled about them. None of the courts had assigned court personnel to oversee children's care while their parents were otherwise engaged. The court conditions for children involved in in-court mediation in Greater London were frankly appalling. The children's comments were regularly used to encourage or even pressure one or both of the parents to accept a particular arrangement. Even when the in-court mediators tried to avoid exerting pressure, the procedure they used to introduce the children's concerns had that very effect. The courts, in attempting to effect settlements, appeared to be giving children inordinate power and responsibility and subjecting them to inordinate pressure in time-limited, tense, unpleasant surroundings. While the use of children's comments in this way has

probably been highly effective in removing cases from the formal adversarial process, we wonder about the cost and even lasting damage to these children.[9] Further research on the advantages, disadvantages, and effects of including children in mediation in other ways would undoubtedly be helpful.

For the purposes of this study, however, these were not the most important divisions among services. The most important divisions were between services trying to protect children and those trying to enable parents to settle their own conflicts in their own ways; and between the services practising dispute- or conflict-resolution and those engaged in therapy or therapeutic processes. We examined these divisions in chapters 3 and 6.

The consumer research indicates that people prefer out-of-court to in-court mediation processes.[10] Disputants appear to dislike the lack of time and the degree of coercion applied during in-court processes in England.[11] Certainly in Greater London we saw that the courts scheduled far too little time for the 'mediation' process. We also saw that some court personnel - registrars and court-welfare officers - tended to be directive in simply telling parents what to do. While many of the results of the in-court proceedings may have been the best ones for the family, the process resembled arbitration or adjudication more than it did mediation.

The pressures of in-court mediation appeared to come from the lack of time and from the fact that the family courts perceived their primary duty to be the protection of the needs, interests, and rights of children. Because of this special role of the courts, some court-welfare officers appeared to be more prepared than their out-of-court colleagues to use their professional expertise and power to exert pressure on the

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9 We should remember here that not all of the in-court services regularly included children. The comments of the court-welfare officers suggest that they were well aware of these problems and that they tried to protect the children in the in-court environment as best they could. The root of the problem was the process, not the personnel.

10 See chapter 3.

11 Ibid.

parents.[12] The majority of the mediators, however, recommended tempering the goals of protecting or promoting the interests of children, and giving expert opinion and advice, with the norm of protecting and promoting disputant autonomy.

While child protection appeared to be an entirely appropriate role for the courts, the amount of direction and pressure involved in in-court 'mediation' was disturbing, since court proceedings and court orders are usually the final stage in the legal divorce process. Parents unhappy with agreements reached in out-of-court mediation may still submit their disagreements to the courts. Agreements reached during in-court proceedings were routinely turned into court orders with little time for parental reflection. The dangers of this approach are readily evident. Very little evidence was heard or considered during these in-court 'mediation' sessions; there were few procedural safeguards; and there was no opportunity to test the accuracy or validity of the matters being presented. When mediation is truly consensual, when recourse to lawyers and the courts remains, and when the experts have no power to impose their wills, as was the case in the out-of-court mediation services, the lack of procedural control and investigation is of less concern. Lack of safeguards and evidentiary controls are cause for great concern, however, when they are part of an arbitration or adjudicative process. They are cause for alarm when they are part of a process which effectively cuts off recourse to the protections offered by formal court processes.

Our examination of mediation services in Greater London lends additional support to the bulk of the mediation research in England, urging the removal of mediation from the courts' adjudicative processes. We must, however, separate process from personnel. The *Newcastle Report* identified the concerns of disputants about in-court mediation.[13] While our study corroborates some of those findings, it does not allow us to conclude that the court-welfare service ought not to be involved in

12 A few of the out-of-court practitioners also suggested a high degree of direction on child issues.

13 As did the G. Davis et. al. studies.

mediation. During the course of this study these officers exhibited a clear understanding of the mediation process and of the limitations of the in-court mediation processes that they were bound to administer. Indeed, the in-court mediators commonly displayed more knowledge of both family-law problems and mediation than did their out-of-court colleagues. Greater London's family lawyers had formed a similar impression. When asked for their opinions about professionals best prepared to provide child mediation, they endorsed the educational and experiential preparedness of court-welfare officers, lawyers, and registrars but failed to endorse the preparedness of the other disciplines.[14] The court-welfare officers' wealth of expertise ought not to be lost just because the process the officers were bound to administer was inadequate. Attention ought to be devoted instead to correcting the faults in the service. If mediation is removed from the court-welfare service and from the courts, the family lawyers and the court-welfare officers may have little incentive to encourage family-law disputants to make use of mediation. It would be a shame if proposals designed to make mediation a better process for families had the effect of reducing the number of families receiving the service. If mediation is moved away from the courts, this would relieve some of the pressure and coercion associated with in-court mediation, but a change in the professionals delivering the service, and the removal of mediation from the scrutiny of the courts, could lead to changes of a more fundamental nature.

While the in-court and out-of-court mediators tended to differ in their perspectives towards child protection and thus in the amount of pressure they were prepared to exert upon disputing parents, the in-court services were not qualitatively different from the out-of-court services. We saw that the goals and methods of the in-court services were not substantially different from those of most of the out-of-court services. When we looked at major qualitative differences among the services, we saw that the most important distinction was not related to whether a service operated on or

14 See L. Neilson (1990).

off court premises, whether or not it had strong connections to the courts, or whether or not it structured its mediation sessions in any particular way. The most important distinction had to do with mediator perceptions of the correct balance between dispute- or conflict-resolution and therapy.

These perceptions were unrelated to connections to the courts or to the judiciary. One of the services providing a process more closely resembling family therapy than mediation had very close connections with the courts[15]; the other was independent of the courts. Both provided mediation off court premises. It was clear, from the practitioners' descriptions of the mediation services in Appendix A-1 and chapter 3, that the incorporation of therapy or therapeutic methods changed the 'mediation' process dramatically. The therapeutic services' goals were different, the roles of their workers were different, and the methods they used were different. Mediation sessions in these services were observed by teams of mediators using video cameras or one-way windows. The 'mediators' used these tools to make therapeutic assessments of families. They focused on relationships, interaction patterns, or family dysfunction, rather than on the specific matters in contention. Clearly the education and training needed to perform this sort of work is very different from that required for conflict resolution.

The fact that only two of Greater London's services were clearly therapeutic did not mean that the other fifteen services sought to exclude consideration and discussion of the emotional components of disputants' conflicts. As we saw in chapter 6, none did so. The differences were of degree or balance. Nine of Greater London's mediation services offered services that were firmly based on dispute or conflict resolution. Emotional and relationship issues were addressed as part of the dispute- or conflict-resolution process, rather than independently. Another six services were prepared to offer a limited amount of counselling or therapy as part of, or preliminary

15 Another service with close court connections was moving in this direction.

to, the mediation process; the other two were clearly therapeutic. When we examined the practitioners' stated preferences in chapter 6, we found that only three of the practitioners recommended that mediators engage in therapy instead of conflict-resolution; ten were prepared to mix family therapy and conflict-resolution; twenty-eight thought some emotional and relational assistance should be offered in mediation, but did not think family therapy appropriate; and fifty-three thought emotional and relational problems should be considered in mediation but only as part of the conflict-resolution process.[16] Obviously these perspectives affect the nature of mediation and thus the education needed to perform it. Knowledge of therapeutic methods is needed by those who provide therapy; knowledge of dispute- and conflict-resolution techniques by those who seek to resolve conflicts.

A Further Look At The Goals of Mediation And The Issues of: Disputant Autonomy And Mediator Power; Disputant Autonomy And The Protection Of Children; Conflict Resolution And Family Therapy

In chapter 3 and Appendix A-1 we learned that the degree of importance attached to disputant autonomy and to conflict resolution markedly affected the 'mediation' being described. Throughout this study we found that the definition of mediation and its goals determined the practitioners' proposals for mediator education and training. Thus, in chapters 4, 5, and 6 we examined the meaning of mediation and the influences upon it of disputant autonomy, mediator power, child advocacy, and therapy. We discovered that most of the attributes of mediation identified by the practitioners related not to healing emotional or relationship problems but to dispute or conflict resolution. In particular, most practitioners thought mediators should be providing a forum and a process within which people with family-law disputes could be encouraged and assisted to resolve their own disputes, to manage their own conflicts in their own way. With that ultimate goal in mind, most of the practitioners thought that mediators should be

16 The remaining 8 were ambivalent or did not address the issue.

trying to improve the flow and form of the family's communication. When we examined the communication goal in more detail, we discovered that the practising mediators were not talking about the need for mediators to try to effect long-term, therapeutic change in communication,[17] but about immediate, short-term changes within the dispute- or conflict-resolution process.

Throughout our discussions we found the mediators emphasizing the importance of protecting and promoting disputants' rights to decision-making autonomy. This norm permeated discussions about the methods to be used in achieving many of the other goals identified. So pervasive was the influence of this norm that we can conclude that it ought to form the normative core of mediation training. The practitioners did not think it appropriate for mediators to tell disputants how to resolve their problems. We also saw, however, that they did think it appropriate for the mediator to educate or to give information to disputants. Thus, we found that in reality all mediators employ some degree of substantive and coercive power. The differences among the practitioners were seemingly dependent on the relative weights assigned to the competency of families to make their own decisions, and to the importance of their own expert knowledge. In chapter 5 we looked at some of examples of the consequences of the practitioners assigning different weights to these values. We found that the mediators who attached the greatest importance to expert knowledge tended to suggest the most directive approaches to mediation.

In chapter 5 we also examined different styles of giving disputants information in mediation. We found that this could be expansive and enabling, or it could be directive, depending on the timing and the methods used to introduce the information. Given the importance of disputant autonomy, therefore, it would appear

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17 Although most practitioners were not trying to produce long-term therapeutic change, many hoped that the disputants would continue to use communication patterns that they had found helpful in mediation in their continuing interactions. The majority did not, however, think therapy or long-term change part of the mediator's role.

that educators need to devote considerable attention to teaching prospective mediators non-directive methods of introducing information. This will become particularly important as mediators move into financial and property mediation, where education and information-giving are expected to form a substantial part of the process.

In addition to disputant autonomy, many of the practising mediators identified the protection of children as one of the goals of mediation. We wondered if these goals were not in conflict. When we examined the latter closely, however, we found that most of the mediators tempered it with the protection and promotion of disputant autonomy: few approved of child advocacy in mediation, they recommended instead that mediators ensure full discussion of the children's interests and concerns during the mediation process.[18] Few recommend promoting the interests of children at the expense of disputant autonomy. We saw how the two goals influenced each other and how they were not necessarily in conflict if the mediator maintained a neutral, facilitative role.

In chapter 6 we examined the connections between disputant autonomy and the assumption of procedural power by the mediator. It appears that structure and procedural controls in mediation can be directive or can promote disputant autonomy and decision-making power, depending largely on the methods of implementation. We looked at examples of directive and expansive forms of the same procedural rules. Again, we discovered that it appears likely that the methods and timing used to introduce procedural rules and structures have more influence on the degree of pressure or direction exerted upon disputants during the mediation process than the type of structure or rule.

We then looked at the assumption of therapeutic power by the mediator. We began our discussions with a theoretical discussion of family therapy and the differences between mediation and therapy. We then discussed some of the differences of opinion

18 The fact that theoretically the practitioners were not in favour of child advocacy in mediation does not, of course, mean that in the heat of a particular mediation session, the mediators always refrained from acting as child advocates.

among the practising mediators about the place of therapy in mediation. We also looked at how the inclusion of therapy in mediation could affect the balance of power in mediation, could be intrusive and directive, and could otherwise endanger the mediation process. The practising mediators questioned the ethics of engaging in therapy without fully informed disputant consent. They also worried about the state intrusion into family life attendant upon the inclusion of family therapy in the legal process; and about the amount of power assumed by those applying therapeutic methods. The mediators expressed concern about the inherent conflict between the expert role of the family therapist and that of the mediator in promoting disputant autonomy; they noted the lack of proof that family therapy works. In examining the research literature, we found that, while many of the benefits of mediation are verifiable by research, the same is not true of family therapy. Indeed a growing body of literature and research is highly critical of the methods used in the latter. Over the years the social-work and mental-health consumer research has shown that people want practical, problem-solving approaches to their family problems.

We find in the mediation literature many authors recommending the use of therapeutic tools in mediation. This study suggests the need for caution. Given the literature devoted to this topic and the importance of some of the practitioners' concerns, it would appear timely to submit this issue to strenuous research investigation. In particular, mediation would benefit by research comparing the results and consumer reactions to 'mediation' services that incorporate therapeutic approaches and methods to those that do not.

_*The Scope Of Mediation: Practitioner Practices And Recommendations With Respect To Property And Financial Mediation*

In chapters 2 and 3 we learned about the experiential, personal, professional, and educational backgrounds of the mediators. In chapters 4, 5, and 6 we looked at the theoretical parameters of mediation. We also needed explore the types of disputes that

the practising mediators contemplated mediating. In particular we needed to know their views about property and financial mediation. These were explored in chapter 7.

Generally, we found that most of the mediators had little experience with global mediation. A substantial minority were willing, however, to engage in global mediation in certain circumstances, and most were in favour of its further development. A substantial minority, however, were opposed. The mediators' collective lack of global mediation experience and education and training in law and finance, and the views of the sizeable minority who did not approve of global mediation, had a marked effect on the practitioners' educational recommendations. The mediators were concerned that their own of education and training would not enable them to provide the service.[19] The family lawyers shared this view and our review of the mediators' educational backgrounds would suggest the view to be correct. While the lawyers did not seek to limit global mediation to lawyers, they advocated extensive training programmes for others.

The mediators were divided in their opinions about how their own educational shortcomings should be addressed. Some recommended limiting mediation to child issues; others recommended improving the educating and training of the existing mediators; still others recommended the involvement of lawyers in mediation. When we looked at the mediators' attitudes towards lawyers becoming mediators, we found that the majority were favourably inclined, albeit with reservations.

The Ideal Family Mediator's Personality and Professional Profile

Once we had gained an appreciation of the parameters of mediation, we also needed information about the type of people to be trained to do mediation. In chapters 8 and 9 we explored the personal and professional attributes of successful mediators. We began, in chapter 8, by examining the relative importances of education and training, and

19 See also chapter 2.

personal characteristics. We examined in detail the personal characteristics that the practising mediators identified, as well as the connections between those characteristics and the requirements of mediation. We included in our discussions an analysis of the implications of these personal characteristics for the members of different professional disciplines seeking entry into the field.

Generally, while almost all of the practising mediators thought that mediators need specialized education and training, the vast majority also considered personal characteristics more important that either the acquisition of substantive knowledge or procedural skills. The consensus seemed to be that mediators need certain personal qualities in order to properly apply learned knowledge, skills, and techniques in the mediation process. The personal characteristics that the mediators identified fell within five broad categories: respect for the individual and the belief that families ought to have the right to determine their destinies; firmness or strength of character to enable the mediator to tackle unpleasant issues and to provide structure and control; self-understanding and inter-personal sensitivity; professional objectivity; and intelligence and common sense. The first and third were held to be the most important. Non-directivity, or the belief in the rights of others to determine their own destinies, was mentioned most often. Again we encountered a concern for the protection of disputant autonomy.

The mediators defined 'professional objectivity' as a form of neutrality or an ability to approach problems in a professionally detached, non-judgmental, but empathetic manner. We looked at how this characteristic differs from the concept of 'neutrality' often identified in the mediation literature. Many of the personal characteristics that the practising mediators identified fell within the self-understanding and inter-personal sensitivity category. It appeared that the mediators considered this type of knowledge or intelligence more important than academic. The mediators' comments and recommendations as a whole led us to conclude that personal rather than

professional, occupational, or academic standards ought to form the gateway into mediation training.

In chapter 9 we completed our examination of who should provide mediation by looking at the professional and educational qualities that the practitioners thought mediation trainees should have before beginning training. We explored the inter-disciplinary tensions in family mediation and the practitioners' opinions about the advantages and disadvantages of various professional backgrounds. Few of the practising mediators sought to limit entry into mediation training programmes to those from the mental-health and social-work disciplines. On the contrary, they expressed reservations about the suitability of most occupational backgrounds. The mediators were evenly divided in their opinions about the necessity for those beginning mediation training to have had some sort of related occupational or 'professional' experience. Many thought personal characteristics a better predictor of an applicant's suitability for mediation training. These mediators proposed having no occupational or professional entrance requirements for mediation training. Although some suggested the need to limit mediation training to those with prior 'professional' experience, a substantial number of mediators argued that previous occupational and professional experience could be a real drawback for the beginning mediator because it would predispose him or her to approach problems in a particular way.

When we looked at the mediation literature we found little evidence that those with a particular educational or professional background make better mediators, although we did note the need for more research on this topic. When we looked at the disciplinary claims to ownership of mediation, we discovered that most of the claims were spurious and that most claimants had not made a complete transition from their original disciplines to mediation. We drew upon the comments of Greater London's practising mediators to illustrate this problem. Some of the claims to ownership or genesis of mediation in the literature, it appears, are based on alleged similarities

between mediation and other disciplines. We suggested the possibility, indeed the likelihood, that rather than proving ownership or parenthood such similarities prove merely that all of the disciplines dealing with family problems are reacting to the same social influences. The similarities may also reflect mediation's influence on other professional practises.

We turned, therefore, to an examination of the practising mediators' arguments in support of limiting mediation to practitioners of selected occupations and professions. We looked first at the practitioners' comments about the advantages and disadvantages of various professional or disciplinary backgrounds for the study of mediation, starting with law. Although most did not suggest excluding lawyers from mediation, they did express some concerns. Among these were the problems that lawyers might have abandoning the use of directive, power-balancing methods in favour of facilitative ones; abandoning the use of expert direction and partisan support; abandoning their tendencies to try to decide right and wrong, truth and falsehood in favour of accepting the legitimacy of a multiplicity of perspectives; and abandoning bargaining and negotiation in favour of integrative conflict-resolution based on addressing individual needs and values. The mediators also suggested the need for lawyers to acquire psychological knowledge in specific areas connected to children and the family.

When we looked at the practising mediators' opinions of the advantages and disadvantages of other 'professional' backgrounds (family therapy, marriage counselling, court-welfare, and probation) we found that they balanced possible advantages against equally possible drawbacks. Generally, while the mediators suggested that members of each of these disciplines have some of the substantive knowledge required by mediators, they worried that mediators might use some of the methods or approaches learned in their earlier disciplines. They were concerned that these would muddy mediation and interfere with its fundamental nature, particularly its respect for disputant autonomy. There was no consensus among the practising mediators about the types of professional

or occupational backgrounds that might be beneficial to the mediator. In short, we were unable to find any justification in the mediation literature or in mediators' comments for limiting mediation to the members of any particular discipline or profession.

Mediation And The Professionalization Process

In addition to exploring the mediators' thoughts about the professional and occupation backgrounds of prospective mediators, we also needed to consider educational goals. Was the final product to be a bevy of lay volunteers, or a group of highly trained professionals? In order to explore this issue, we first had to consider the professionalization of mediation. We began our discussions in chapter 10 with a review of the technical meaning of 'profession' and a perusal of the professionalization process. We discovered several hurdles to the professionalization of mediation: mediation was not yet a full-time endeavor, no strenuous educational qualifications were required, and the public has so far not evidenced a demand for the service. We discussed some of the possible reasons for the lack of public demand, as well as the attempts to stimulate public demand artificially by making attendance at mediation involuntary. We questioned the morality and legality of this trend, given the directivity of some mediators and given the public's fundamental right to access to the legal process.

We also looked at the practising mediators' attitudes towards professionalization where we found a marked difference of opinion. Those in favour of professionalization sought to upgrade mediation's educational requirements and wanted mediators to acquire status and professional power. Those opposed to professionalization expressed concern about the potential loss of part-time practitioners and the feasibility of practising mediation full-time. They were also concerned about the potential loss of cross-disciplinary fertilization and development in the field that professionalization would bring, and about the conflict between the concept of 'profession' and mediation's central norm of disputant autonomy. The latter appeared particularly important. If the

mediator's role is to be facilitative rather than to give expert advice, why the need for professional status and power? We concluded that educators should teach mediators to approach conflict-resolution in a professional manner, or with 'professional objectivity', but without the assumption of responsibility and power that one normally associates with 'professional' practice. Put differently, educators need to concentrate their attention on producing mediators with expertise in the use of non-directive methods of assisting others with conflict-resolution, and with an ability to stand aside from making judgements about the substantive issues in dispute.

The Mediator's Training: Proposals For Course Content

In chapters 2 to 10 we laid the foundations for educational programmes in mediation. This background information allowed us to consider the content of mediation training in Chapters 11, 12, and 13. As we examined the practising mediators' and lawyers' proposals, we had to keep in mind not only the parameters of mediation, but also the practitioners' educational, professional, and experiential proficiencies and shortcomings. In chapter 2 we found, for example, that the practising mediators had considerable experience working with individuals or families in their capacities as family therapists, social-workers, or counsellors. We noted that many were well read in the areas of the psychological development of children and the psychological effects of divorce on family members. Although we expected the mediators to emphasize the importance of these subjects, they did not always do so. Most identified only knowledge relating directly to the processes of dispute-resolution and divorce. Furthermore, much of the knowledge identified was qualitatively different from that normally associated with mediators' primary disciplines. The mediators' apparent lack of disciplinary bias enhanced the persuasiveness of their comments.

We began our discussions in chapter 11 with an examination of the practising mediators' opinions about the necessity of mediators acquiring procedural and conflict-

resolution knowledge. Although, as we have seen, a substantial minority of the practising mediators lacked extensive mediation training and experience, most had experience in assisting families with conflicts, if not always as mediators. The mediators' educational limitations in mediation became apparent in this chapter. The mediators complained about their own lack of preparatory training for practice. Their responses appeared to reflect a lack of dispute- or conflict-resolution knowledge. To compensate for their own educational shortcomings, practitioners were attempting to turn methods learned in their original disciplines into dispute- or conflict-resolution tools.

We expected the mediators' educational weakness in this area to be reflected in their endorsements of the conflict-resolution subjects, but this was not the case. Most answered in accordance with their understanding of the requirements of the mediation process discussed in chapters 4, 5, and 6. The mediators appeared to have a clear understanding of the mediation process but lacked exposure to some of the specialized training needed to perform it. Subjects relating to dispute- or conflict-resolution were given the highest rankings of all subjects; therapeutic subjects, even procedural ones, were endorsed only by a few. Although the majority of the mediators were not able to give much guidance on the specific matters to be included in the mediator's training in this area - other than methods emended from mental health backgrounds - they had some important suggestions. In particular, they suggested[20] that beginning mediators be taught: how to structure mediation sessions; how to use non-directive methods to introduce information, to balance disputant power, and to focus discussions; how to use techniques to rephrase disputants' comments and to redirect disputants' approaches to their disputes and conflicts in a manner conducive to resolution[21]; how to discern disputants' non-verbal forms of communication and to

20 Included here are some of the dispute or conflict resolution methods that the mediators isolated when commenting on the need for mediators to have knowledge from the mental-health fields.

21 There was some debate among the mediators about the use of therapeutic tools. See chapters

appreciate the types of non-verbal communication most likely to occur in the mediation process; how to ascertain the disputants' respective emotional stages in the divorce process[22]; how to balance discussions in small group meetings; how to recognize and balance disputants' respective powers and inequalities in negotiating abilities; how to include or consider in mediation all persons likely to have an impact on the failure or success of any resolution; how to mediate with professional neutrality or objectivity; how to listen actively and effectively; how to provide a suitable venue; how, through negotiation expertise, to change the form of the disputants' negotiation from adversarial and confrontational to co-operative and integrative; how to order the matters in contention; how and when to shift discussions from principles to interests or values, or the reverse; how to use time effectively and to pace discussions; and, finally, how to use tactful and informed referral practices.

The lawyers tended to assign lower priority than the mediators to the need to acquire knowledge of dispute resolution techniques, yet higher priority to counselling skills. This appeared to be a result of the lawyers' lack of familiarity with the term 'dispute resolution'; and more fundamentally to a lack of understanding of the requirements of the mediation process. Some appeared to confuse mediation and counselling. Some, perhaps, doubted the appropriateness of their own dispute-resolution methods. In chapter 11 we compared the resolution tactics commonly employed by lawyers to those used by mediators. We concluded that, although the members of both disciplines require extensive knowledge of negotiation tactics, the type of negotiation knowledge used and the manner of application differed.

The mediators and the lawyers alike gave high priority to the need for an apprenticeship period for beginning mediators. Surprisingly, the practising mediators did not give priority to teaching ethical responsibilities. Some did not understand the

6 and 12 for further discussion.

22 Needed to enable the mediator to understand the disputants' behaviour and to appreciate the differences in the disputants' respective negotiation abilities.

importance of this issue; others were thinking only of personal ethics; still others considered the ethics of their primary professions adequate. The mediators' continuing reliance on the ethics of their primary professions was yet another illustration of the fact that a number of the practitioners had not made a full transition from their original disciplines. Those who did consider ethical training important suggested the need to include in the mediator's training discussion of: the ethical limitations of disputant autonomy; the importance of non-directivity; the ethical issues associated with confidentiality; the ethics of including other processes in mediation without fully informed client consent; and finally, the relevant codes of professional conduct, including discussion of conflicts between the mediator's ethical duties and those of other disciplines.

It was clear from the practising mediators' responses as a whole that the majority expected conflict resolution, which belongs to neither the mental-health/social-work nor the legal discipline, to form the nucleus of mediation training. Substantive mental-health or social work, legal and financial knowledge, while important, were considered to be secondary. Procedural subjects - if related to conflict resolution - were given the highest priority. This view is entirely consistent with the requirements of the mediation process and with the bulk of the mediation literature.

Chapter 12 examined the practitioners' comments about the need for mediators to acquire training from the mental-health fields. We recalled that the mediators had a wealth of expertise in this area and wondered if this would cause them to endorse the importance of this knowledge, even when the knowledge was but tenuously connected to mediation. We found that they did not do so, which served to reinforce our confidence in their suggestions. The mediators gave priority to the need for prospective mediators to gain a knowledge of the literature and the research in the following areas: the emotional components of the divorce process; the psychological effects of family reorganization on family members, particularly children; the advantages and

disadvantages of various child arrangements; the variations by age in children's responses to family reorganization; the age-appropriateness of different types of custody-and-access arrangements; indicators of child abuse[23]; appropriate child interviewing techniques; a practical, rather than theoretical, understanding of how families operate, including an understanding of the specific problems encountered when one attempts to blend families; and, finally, a basic understanding of the various family therapies for purposes of referral. Surprisingly, during their discussions of the psychological effects of divorce on family members, none of the mediators spoke of the need for mediators to learn about the debilitating effects of the financial consequences of divorce and family reorganization. This probably reflected the mediators' lack of education and experience in financial and property mediation.

The family lawyers tended to assign low priority to all mental-health subjects, possibly because they were concentrating on financial and property mediation when they answered educational questions, possibly because they tended to undervalue substantive knowledge that they themselves lacked. The mediators' superior expertise, and their apparent lack of disciplinary bias, caused us to suggest that more weight could be given to the mediators' than to the lawyers' educational suggestions regarding those aspects of mediator training derived from the mental-health disciplines.

Throughout the mediators' comments on the need for mediators to acquire mental-health and social-work knowledge, we noted three common themes: that mediators need acquire only knowledge relating to divorce or family reorganization and the mediation process; that mediators should introduce substantive information in accordance with mediation's norm of disputant autonomy; and that mediators should learn about normal rather than abnormal responses to crisis, separation, and divorce. This latter distinction is important. Most mediators recommended gearing mediation's methods to the mainstream of the divorcing public, not to those in great emotional or

23 This subject was identified when the practitioners were talking about legal knowledge.

psychological turmoil. All therapeutic subjects consequently received relatively low rankings. In keeping with this understanding of the mediation process, the practising mediators commonly identified procedural or dispute-resolution tools when they were asked about the importance of selected social-work and mental-health subjects. The conflict-resolution tools that they identified were tools they had taken and emended from the family-therapy, counselling, and social-work disciplines. Although many of the tools identified had, during the emendation process, lost their social-work, counselling, and therapeutic natures, the mediators continued to identify them with those disciplines. Chapters 11 and 12 contain some examples of the misunderstandings that can occur because authors, researchers, and practitioners have not fully understood this trans-disciplinary emendatory process. We concluded that the process was cumbersome, inefficient, and often inappropriate. Educators will best serve aspiring mediators if they gave them specialized training in negotiation, mediation, and conflict-resolution along with the substantive mental-health training relating directly to an understanding of the psychological implications of the family reorganization process and its aftermath.

During our consideration of the need for mediators to acquire knowledge from the mental-health fields, we encountered a concern among some of the practising mediators that beginning mediators might be indoctrinated into the use or acceptance of any one theoretical model or mental-health perspective. (We explored the effects of applying one theoretical model in chapter 6 and in Appendix A-1.) These practitioners suggested the inappropriateness of applying any one theoretical perspective to the exclusion of others, given the variety of divorcing families and their problems. The mediators hoped, instead, that beginning mediators would be exposed on a general, basic level to a multitude of mental-health perspectives, and that they would gain a practical rather than theoretical understanding of family problems. The latter may be a major hurdle for educators trying to teach people from one discipline to mediate disputes

within another. If in fact most of the substantive knowledge that mediators need in law and from the mental-health disciplines comes from practical experience working within these disciplines and not from theory or 'professional' training, then it would appear that cross-disciplinary training may not be entirely satisfactory. If so, perhaps mediation models that incorporate the members of several disciplines will be needed. This issue requires further investigation.[24]

Alternatively, perhaps it is possible that this particular group of practising mediators was particularly adverse to formal education. An underlying current of dislike for theory and academic forms of learning ran through many of the mediators' comments in this chapter. It was not possible to tell from this study whether this perspective was derived from the practitioners' occupational experiences, which had taught them that academic theories and constructs are not relevant to human problems; whether it was connected to their own educational and academic shortcomings; or whether the perspective was part of the nature of family mediation. All three possibilities likely have some validity, but we have no way of assessing the strengths of their influences. In any event all theoretical categories were criticized by the practitioners and received relatively low rankings.

In chapter 12 we also discussed the reasons that the practising mediators gave for endorsing the need for mediators to gain an understanding of how families actually interact, as opposed to 'family-systems' theory. In addition to sharing a dislike for theoretical constructs, the mediators had some specific concerns about the suitability of family-systems theory for divorce mediation. They expressed concerns about the theory's focus on past relationships, its narrowness, and the incompatibility of its methods of implementation and mediation's assumption of disputant competence and autonomy. We did find, however, that certain aspects of the theory could be helpful to

24 The University of Newcastle Upon Tyne is doing research comparing global mediation with lawyers as co-mediators to global mediation with lawyers as advisors. Perhaps these studies will give us some guidance on this issue.

mediators if removed from particular family-systems models and used merely as a conceptual aid.[25] The family lawyers joined the mediators in failing to endorse the need for mediators to learn family-systems theory. Given the prominence of this subject in the mediation literature, and the importance of the practitioners' concerns, the need for further research on the relevance of family systems' theory and its methods to mediation is evident. This study concludes that it would be wise to halt further efforts to include family systems methods in mediation until procedural research warrants their incorporation.

In Chapter 13 we examined the practitioners' recommendations for the legal and financial content of mediation training. Again, we had to keep in mind the mediators' backgrounds, given their weakness in these areas. In chapter 2 we learned that the mediators' training and reading in financial and property law areas was almost non-existent; in chapters 3 and 7 we learned that the mediators lacked mediation experience in these areas; in chapter 13 we learned that mediators were even weak in legal subjects relating exclusively to mediation. For example, we found the practitioners in utter confusion about the legal meanings, parameters, and importances of confidentiality and privilege to mediation. The mediators' lack of education in child law and in the relationship of confidentiality and privilege to mediation warrant immediate attention by existing training bodies.

It is likely that the practising mediators' lack of education, combined with their lack of global mediation experience, affected their rankings of the legal and financial subjects. Many of the experienced mediators commented that they had learned of the importance of substantive knowledge from other disciplines only as they gained mediation experience. Mediators' ranking of the subjects connected to financial and property mediation was further complicated by the fact that a substantial minority of

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25 Generally these conceptual aids were not exclusive to family-systems theory but they could be derived from it.

the practising mediators opposed global mediation. These practitioners, and many of those considering only the training requirements of their own mediation services, took into account only mediation of child disputes when they ranked the importance of the various legal and financial subjects offered. This led us to temper the mediators' suggestions with those of the lawyers and to assign extra weight to the comments of the mediators with global mediation experience. Legal and financial subjects received much higher rankings among those with global mediation experience. Too few had global mediation experience, however, to allow firm conclusions. While we had to keep in mind the fact that the mediators' recommendation were based, for the most part, only on experience with mediation of child issues, they nevertheless had some worthy contributions.

As part of our discussion of the legal education required by mediators, we explored the professional boundaries of mediation and family law. We noted that, during the course of the interviews, a significant minority of the practising mediators made statements indicating that they thought it part of the mediator's role to offer legal advice. We explored this issue by looking at some of the dangers posed by mediators overstepping their professional boundaries, and concluded that the role was inappropriate. Throughout the mediators' comments in chapter 13 we encountered arguments that mediators do not need a great deal of legal knowledge because that information is readily available from lawyers. We also found, however, a reluctance among some of Greater London's mediators to refer mediation clients to lawyers for legal advice. We suggested that the mediators appeared to fear potential loss of control over their clients. Possibly they were also worried that lawyers might encourage their clients to become adversarial or that the lawyers would be critical of their attempts at settlement. Mediators spoke of the need for more co-operation and referrals from lawyers. There would appear to be a similar need for more cooperation and better integration of professional services on the part of mediators. If disputants do not

receive legal advice throughout the mediation process, there is a risk they will be harmed rather than assisted by the experience.

We also know, however, that the services that lawyers provide differ from the services that mediators provide. We looked at some of those differences in chapter 13 and discussed some of the implications those differences have for mediation training. We concluded that, although mediators do not need the same precision or depth of legal knowledge that lawyers need, they do need to know the parameters of legal acceptability and enough law to be able to clarify and simplify the legal issues being discussed. When we examined the mediators' general comments about the need for mediators to acquire legal knowledge, we encountered suggestions that mediators be given an overview of the law in the areas, including: an understanding of legal terminology; an understanding of the parameters of legal acceptability; and an understanding of the meaning and implications of relevant court orders and undertakings, as well as agreements between disputants. Because these general comments suited the requirements of mediation and the role of the mediator, we concluded that they were worthy of due consideration.

Most of the mediators, despite their own lack of training, assigned great importance to instruction in child law. They also thought divorce law important, but less so. They gave moderately high but limited endorsement to the need for mediators to receive training in how confidentiality and privilege pertained to mediation; and in the implications for mediation of ouster, non-molestation, and protection orders. We discussed the parameters and depth of the knowledge proposed. The mediators also rated knowledge of the legal position of step-parents and knowledge of child abuse law moderately highly, but from their comments it appeared that they were more concerned about mediators' understanding the social and psychological issues and indications of child abuse, than they were about mediators learning the law in these areas. All other legal and financial subjects were given low ratings.

In order to determine accurately the importance of specific items of legal and

financial knowledge for global mediation we had to balance the opinions of the practising mediators with those of family lawyers. At first glance this seemed a surprising proposition, but it became less surprising when we recalled that family lawyers had experience resolving family-law financial and property disputes, although employing different methods. While we questioned their collective ability to offer reliable guidance on the procedural expertise that global mediators need, we concluded that they did have broad and considerable expertise on which to base their opinions about the substantial knowledge required. The family lawyers gave top priority to the need for mediators to learn property, maintenance, child, and income tax law[26] and recommended that global mediators either have legal training and experience or extensive professional training. A review of the literature, the law, the mediators' comments and the lawyers' suggestions led us to conclude that global mediators would require the depth of legal knowledge suggested by the practising mediators but that they would need to add to their training instruction in various areas, including: budgeting skills; a basic understanding of the advantages and disadvantages of different valuation methods, including, for example, those used to determine the value of various types of real estate, companies and professional practices, businesses, and interests therein, pensions and annuities, insurance policies, investments, and interests in trusts; a basic understanding of the law with respect to trusts and inheritance; a basic understanding of property law, and in particular the law concerning property entitlement and division on family reorganization; an understanding of local authority housing rules and policies; an understanding of spousal and child maintenance law; a basic understanding of the law of tenancies; an understanding of the income tax implications of transfers of income and property among family members; and a limited understanding of evidentiary law in

26 The lawyers' questionnaire was kept as short as possible to encourage busy lawyers to respond. Consequently not all of the subjects suggested in chapter 13 were offered to the lawyers for their consideration. In spite of this, a few took the time to add some of them. Presumably other lawyers would also have endorsed many of these subjects had they been offered.

order to create adequate guidelines for disclosure.

Practitioner Comments on the State of Mediator Education and Suggestions for Future Development

In chapter 14 we learned that the family lawyers and the practising family mediators had mutual concerns about the education and training programmes available to aspiring mediators. The family lawyers indicated that one of the reasons they were not referring more of their clients to mediation was that they had concerns about the educational preparation of mediation's practitioners. We learned that none of Greater London's mediators who commented on the issue considered adequate the education programmes available to mediators in England. Complaints about their own educational preparation for mediation practice were common. The growth of mediation in Greater London appeared to have preceded the educational preparation of its practitioners. There appeared to be an early presumption that the members of the collateral disciplines (social-work, law, family-therapy, and counselling) possessed all of the requisite knowledge and skills. This study makes clear the fallacy of that presumption.

Consequently, in chapter 14, we found the family lawyers and the mediators alike recommending fundamental improvements in the education and training of students intending to become mediators. Their recommendations were surprisingly similar. Neither group sought to exclude the members of other disciplines from participating in mediation, provided those wishing to participate possessed the personal qualities required of mediators and provided they received adequate preliminary educational preparation. The members of both disciplines suggested training programmes on the order of one year part-time, or 120 hours, for those who would mediate only child issues, and on the order of two years part-time or one-year full-time, graduate-level training for those who would also mediate property and financial issues. We saw that these suggestions were far in excess of practically all of the training programmes currently on offer. The lack of common language among the mediation

practitioners, their incomplete transitions from their original disciplines to mediation, their continuing reliance on methods derived from their primary occupations, and their uncertainties about their own competence to offer global mediation, all suggest the need for better educational programmes. If mediation is to become a viable alternative to the adversarial process, mediation's practitioners will probably have to attain levels of expertise comparable to those offered by the professionals who provide adversarial services.

Inherent in increasing the educational standards of mediators, however, lies a danger to the mediation process. We encountered suggestions in the literature that improving educational standards could lead to the professionalization of mediation and thus to an emphasis on the importance of professional expertise at the expense of an emphasis on disputant autonomy. It remains to be seen whether educators can meet the educational needs of mediation and, at the same time, preserve its fundamental character.

In chapter 14 we also explored the mediators' recommendations for course structures, teaching methods, and continuing mediator education. The majority of the mediators suggested including periods of supervised practice in the latter stages of formal training. We concluded that existing mediation services could play a useful role in this process. Some suggested the use of 'modules', so that members of the collateral professions could take only those subjects in which they were weak. We noted the possible advantage of such a provision to those practising in the collateral disciplines, but also the loss of cross-disciplinary discussions. If conflict-resolution and non-direction are to form the core of the mediator's training, however, the course length might not be substantially altered by the use of training 'modules'. All of the mediators were in favour of continual, on-going training for mediation practitioners.

The mediators differed in their opinions as to who should be responsible for mediation training. Equal numbers suggested training by a national professional body,

by academic institutions, and by existing local mediation services. We examined the mediators' arguments and were not able to reach any firm conclusions. It did appear, however, that the academic and the national body alternatives provided the best control over quality. This is not to deny the need for the participation of existing mediation services. These seemed best placed for providing facilities for supervised practice and for teaching beginning mediators about the socioeconomic, racial, and cultural makeup of local communities and the attendant implications for family mediation practice. The practising mediators suggested the need for educators to use experiential teaching methods, for example: role-play, small-group discussions, and participant observations of mediation sessions, in addition to reading and lectures. We continued to encounter an aversion to theory and academic types of learning, and a wish to focus attention on the tools of the mediation trade. We suggested that this, along with the lack of common language and the incomplete disciplinary transitions encountered throughout this study, reflected the early stage of mediation's disciplinary and professional development in England. We suggested that this might also be the situation elsewhere.

Discussion and Recommendations

This study has solicited the impressions, views, practices, and opinions of those with professional experience in settling family-law conflicts. On the one hand, this has enabled us to explore the viewpoints and perspectives of those with the most practical experience in the delivery of the service under investigation. Since the study included 90.3% of the mediators practising in Greater London, there is little question about the representativeness of the mediators' collective mediation experiences. The practitioners' suggestions for mediator education and training were derived from their own practical mediation experience. They were not merely theoretical or academic.

On the other hand, the study has limits. We do not know, for example, how representative were the professional experiences upon which each practitioner based his

or her opinion, nor have we tested the effects of the practitioners' conclusions and suggestions in practice. The study is, therefore, a beginning rather than an end, generating a multitude of questions needing further research. We need researchers to test, for example, the validity of the practitioners' impressions that dispute- or conflict-resolution is more appropriate than therapy for the mainstream of the divorcing public. We need more information about the effects of established professional backgrounds on mediation practice.[27] We need to learn whether or not professional experience is an impediment or an asset to learning mediation. How do newly trained mediators without prior 'professional' experience compare to those with it? How do practising mediators with low levels of mediation training compare to practising mediators with extensive training? What are the implications in terms of outcome, process, and consumer-satisfaction of a mediator's theoretical orientation, such as his or her view of the relative importance of disputant autonomy, professional responsibility, child protection, and family therapy? If effective mediation is not related to professional background, as the current mediation literature suggests,[28] is it, as the practitioners in this study have suggested, related to the mediator's personal character? What happens to mediation when lawyers are included in the process? These questions cry out for further investigation.

As we have seen, the educational programmes suggested by this study are considerably longer than most of those currently available to mediators. Mediation trainers, mediation associations, the collateral 'professions', and probably at one time even mediation itself, all have had something to gain from short-term training programmes. It is undoubtedly more profitable to teach short-term courses to professionals willing to pay professional fees than longer-term courses in educational institutions: educational prerequisites for teaching short-term courses are lower and

27 We need to know if lawyers, social-workers, court-welfare officers, and family therapists elsewhere also tend to practice mediation differently.

28 See chapter 9.

shorter courses allow more people to begin providing mediation sooner, thereby increasing the availability of mediation and membership in mediation associations. Short courses also allow the existing 'professions'[29] (social-work, family therapy, counselling, court-welfare, law) to dominate the field, to claim 'ownership' of the emerging discipline.

Short courses are justified on the basis that they are only open to members of existing 'professions' who allegedly already have much of the knowledge required. Because they are time-limited, members of the collateral professions are able to take time from their professional endeavors to 'learn' the new discipline. They then claim that others cannot possibly gain the expertise required to practice mediation in courses of similar duration. The existing professions are thus able to dominate the field and even to begin closing entry to others. In some jurisdictions those who are not from one of the social-work, mental-health, counselling, or legal disciplines, are beginning to be excluded from family mediation training and practice.[30]

Are the exclusions justified? For the most part the comments of Greater London's mediation practitioners suggest they are not. Co-operative conflict-resolution expertise belongs neither to the mental-health/social-work or legal disciplines. To the extent that substantive knowledge is required, neither the mental-health nor the legal disciplines can claim to occupy the field. Each must acquire the substantive knowledge of the other. Presumably, then, the substantive knowledge required from each discipline is not so extensive that it cannot be learned by people from other disciplines. Given the importance to mediation of disputant autonomy, it now appears likely that the influences of prior professional experience are as likely to be negative as positive to learning mediation. Professional exclusiveness is not warranted on the basis of advantages to the mediation process.

29 The term 'profession' continues to be used loosely. For an explanation and definition, see Chapter 10.

30 See chapter 9.

When we consider mediation in practice and think about who should provide the service, this study suggests the need to consider the mediation processes and the people delivering them separately. The study corroborates arguments in favour of separating mediation from the judicial process but does not suggest that court-welfare officers no longer provide child mediation during the legal process. We saw that the court-welfare officers had considerable expertise in the field and also that the family lawyers had confidence in them. While the study was critical of the degree of coercion involved in in-court mediation, it also illustrates differences among mediation services of a more fundamental nature. We explored the effects of therapy on disputant power in chapter 6. There is a danger that this type of service will proliferate if mediation services become increasingly independent of the control of the courts, lawyers, and the court-welfare service.

The study also questions the feasibility of voluntary, global mediation services unconnected to the courts or to lawyers. We saw that most of the voluntary, out-of-court services in Greater London were dependent on lawyers for clients. We also noted that the family lawyers expressed a reluctance to entrust their clients to global mediators who were not lawyers unless they had extensive professional training. We found that the lawyers' expressed educational concerns had validity. The alternatives appear to be including lawyers in the global mediation process, and making substantial improvements in the education and training required of mediators.

We looked at the various alternatives: including lawyers in the process (as legal advisors or as co-mediators), upgrading the education and training of non-lawyers, limiting mediation to child issues. Since current research and consumer demand suggest that the latter alternative is not feasible or advisable,[31] we are left with the first two alternatives. If members of the legal profession are to become mediators, this study suggests that they ought to be chosen with care. The mediators suggested preliminary

31 For further discussion and references, see chapter 7.

screening on the basis of personal characteristics,[32] followed by rigorous training in selected subjects drawn from the mental-health, social-work, and counselling fields, and particularly from mediation and conflict-resolution.[33] The socio-legal literature with respect to the settlement methods used by lawyers, the mediators' criticisms in this study of the conflict-resolution approaches used by lawyers, and indeed the lawyers' criticisms of their own training and approaches to conflict-resolution support the mediators' contentions.

We discussed some of the differences between legal and mediation services in chapters 9 and 13. If lawyers engage in mediation and if the perspectives and methods of family lawyers are not altered in specialized mediation training, and if those changes are not periodically reinforced, it is likely that the mediation services offered by lawyers will be as different from conciliatory conflict-resolution as were the therapeutic and in-court services offered by the therapists and court-welfare officers in this study. If uncorrected, this study suggests lawyers will tend to offer services resembling arbitration.

Lawyers-cum-mediators will probably need more training than is currently on offer in England if they are to make a complete transition from the practice of law to the practice of family mediation. The Family Mediation Association (FMA) offers an excellent interim model in that it pairs family lawyers with mental-health professionals in mediation practice, but the model is unlikely to provide the final solution.[34] Teaming mental-health workers with lawyers ensures coverage of the substantive knowledge that mediators need but, without extensive retraining, particularly in new approaches to dispute or conflict-resolution, the combination may give a false sense of security. The FMA offers a five day training course, followed by a period of supervised practice, to

32 This suggestion does not only apply to lawyers. The practitioners suggest some sort of personal screening for all would-be mediators. See chapter 8.

33 For particulars of the content of education suggested, see chapters 11, 12 and 13.

34 Besides the educational and procedural problems that we discuss here, are considerations of cost.

members of the mental-health and legal disciplines wishing to mediate together.[35] It now seems unlikely that a course of this duration could turn either the family-law or mental-health practitioners into mediators, particularly if the professionals continue to work independently in their respective professional fields after completion of the course. There is a danger that some members of the FMA will end up providing a service that incorporates the practice of law with the practice of family therapy or counselling, instead of a process of dispute- or conflict-resolution which promotes disputant autonomy and decision making.[36]

Several practising mediators suggested another possibility: including lawyers in the mediation process as legal advisors rather than as mediators. If the process is to retain its emphasis on disputant autonomy and responsibility, lawyers involved in mediation in this way will also need mediation training. Otherwise, the research suggests, it is likely that mediators using this model will be forced to assist the lawyers' rather than the disputants' resolution process. The process then becomes a variant of inter-lawyer negotiations. Another suggested alternative: not including lawyers in the global mediation process but referring the disputants to independent lawyers whenever legal issues arose, was not feasible at the time of this study. Very few of the family mediators working in Greater London in 1987 and 1988 had the legal and financial training required to make this model work.[37] Upgrading the education and training of non-lawyer mediation practitioners was the other alternative. Both the law and the mediation practitioners' defined 'adequate training' in terms of two-year, non-graduate or one-year graduate-level training programmes.

If mediators are to offer effective, competent, global mediation services, these

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35 Family Mediation Association Training Course, London, June 1989, L. Parkinson (1990c): 10-11.

36 If one were to combine the practice of law with the practice of counselling and therapy one might well produce a worthwhile service, but the process would be different from mediation as it has been defined in this study.

37 For particulars of the mediation practitioners' training, see chapter 2.

are the educational and professional alternatives. Otherwise the services will be left to stumble along, as they do now, with inadequate training, inadequate funding, and few clients. The future will tell whether or not the government, the legal system, and society will endorse mediation. If so, will it be simply as a method to cut financial costs, or as a sophisticated and worthy alternative to the adversarial process?

Whichever educational and professional alternative is chosen, educational programmes ought to be put in place before consumer research is conducted. If not, there is a grave risk that the research will tell us more about counselling or therapy or the practice of law than about mediation. If lawyers do not receive adequate mediation training and if researchers study the 'mediation' services they offer, it is likely that they will learn more about the effects of offering legal services jointly to opposing disputants than about mediation by lawyers. Similarly, if one wishes to study the mediation services of therapists, social-workers, counsellors, and court-welfare officers, it is important first to ensure that they are properly trained and actually doing mediation and not something else. Perhaps the financial emphasis, at least for the time being, ought to be directed to education and training programmes for mediators rather than to consumer studies.

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APPENDIX A-1

Mediation Services in Greater London 1987 - 1988[1]

Introduction

A detailed service by service description of the mediation services in Greater London follows. The services have been grouped into four types: services operating from the courts and offering dispute-resolution assistance; services working independently of the courts and offering dispute-resolution assistance, services offering therapeutic assistance, and services focussing on dispute-resolution but incorporating therapy or therapeutic methods. We shall look at the in-court, dispute-resolution services first.

Section 1: Greater London's In-Court Dispute-Resolution Services

Service #1: The Acton and Uxbridge Divorce Units[2]

All three offices of the Middlesex Divorce Court Welfare Service, located at Acton, Uxbridge and Highgate were originally administered by one chief court-welfare officer. During the course of this study a new chief officer was hired to administer the Acton and Uxbridge units while the Highgate office retained its former chief officer. For this reason Acton and Uxbridge have been counted as one service and Highgate as another.

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1 The description of mediation services in Greater London is based on the mediators' descriptions of the services they were providing in 1987 augmented by observation of mediation facilities, and participant observation of a limited number of mediation cases. It is possible that, in the heat of a particular mediation session, actual practices differed from practises described to me. The descriptions are offered to illustrate theoretical perspectives and approaches, not to forecast mediator behaviour.

2 The information about the Acton and Uxbridge Units which follows is based on a series of formal interviews conducted in 1987 with five court-welfare officers; informal interviews with three registrars; attendances at two court welfare offices; attendances with two registrars on two separate days for twelve in-court mediation appointments held before them; attendances with a court-welfare officer and two sets of mediation clients throughout the in-court mediation process; interviews with one judge and one court clerk and attendance for direction hearings at one court which did not offer formally scheduled mediation appointments. The information was updated by interviews with court-welfare officers from each office in the summer of 1988.

While court-welfare officers were sometimes traded among the three Middlesex court-welfare offices in accordance with the ebb and flow of court demand for court-welfare services, and while all three Middlesex court-welfare offices were alike (and different from all other court-welfare services in Greater London) in that they shared their respective premises with colleagues from probation; in actual fact the work they did and the processes in the courts they served were quite different. We shall therefore deal with each office separately with respect to their facilities and the courts they served, but first a history and overview of all three services as they existed in 1987.

Overview of the Middlesex Court Welfare Services:

Court-welfare officers from all three of Middlesex's court-welfare offices, in co-operation with Marriage Guidance counsellors formerly ran an voluntary, out-of-court mediation service commonly known as the 'Barnet' service. Most of the Middlesex court-welfare officers, therefore, had experience providing both in and out-of-court mediation. The Barnet service was discontinued in 1986 at the request of the court welfare officers' superiors within the probation service because the operation of the service was cutting into the time the officers had available to perform their other, statutory duties. In 1987 the Marriage Guidance councils in Middlesex had taken over the administration of this out-of-court mediation service. Their efforts are described in 'Service #9: the Marriage Guidance Council Family Mediation Service'.

The Middlesex Court Welfare Service (MCWS) had three offices at: Acton, Highgate and Uxbridge. Those offices provided family court welfare services to five courts: Barnet County Court, Edmonton County Court, Brentford County Court, Willesdon County Court and Uxbridge County Court. MCWS did no criminal work. Its duties included conducting family or child welfare investigations for courts located inside and outside Middlesex if the children involved lived in one of the six

London/Middlesex boroughs they served; allocating family welfare enquiries ordered by County Courts in Middlesex to other probation or court-welfare units if the children involved resided outside of the Middlesex area; and providing dispute-resolution services to the five courts served. MCWS did not provide family dispute-resolution services to the Domestic or Magistrates' courts in Middlesex. Consequently probation units continued to provide some domestic/family assistance in those courts.

The court-welfare units in Middlesex shared offices with the probation service. As we shall see, when we look at each unit individually and particularly when we look at the premises occupied by the Highgate unit, this caused problems for the court-welfare officers who were trying to create a family rather than criminal atmosphere.

MCWS offered dispute-resolution assistance in five courts. Three of these, the Barnet, Edmonton and Uxbridge County Courts, had made mediation part of normal court process. The other two courts sought the service's dispute-resolution assistance on an ad-hoc basis, if and when required. In addition to formally established mediation in the courts, the MCWS also made its officers available to all five courts during section 41 hearings.[3] When disputes relating to the care of children arose during these hearings, some judges asked the parents to step outside the hearing to speak to the court-welfare officer in attendance to see if the dispute could be resolved and then adjourned the

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3 These hearings were held pursuant to section 41, Matrimonial Causes Act 1973, which provided that a court could not grant a decree of divorce absolute, or nullity without enquiring into the arrangements being made for any children involved and being satisfying that those arrangements are satisfactory, the best that can be arranged in the circumstances, or that the parties before the court could not practically make such arrangements; unless the court is convinced that notwithstanding the circumstances of the children, there are other circumstances making it desirable to grant the decree without delay. With the coming into force of Schedule 12, paragraph 31 of the Children Act 1989 parents will still be obliged to submit their arrangements for the children to the courts prior to decree of divorce or nullity but the courts will no longer be under an obligation to pronounce on those arrangements or to postpone the granting the decree unless exceptional circumstances exist making that course of action desirable in the interests of a child. See also: A. Bainham (1990); Family Law 19 (1989): 175; B. Hoggett (1989): 218; T. Wells (1989): 235.

hearing for a short time for that purpose. Hence some short-term 'mediation' was being provided by the court-welfare officers at this late stage in the divorce process.[4]

While property and financial matters might be mentioned by disputants during mediation sessions, MCWS limited itself to disputes about children. Those seeking assistance with financial and property issues were referred elsewhere.[5] MCWS did not accept mediation clients from any source other than from the courts. Most of the mediation provided by this service was provided on court premises between scheduled mediation appointments before the registrars. Mediation was also sometimes, however, adjourned to court-welfare offices for further sessions:

> You are encouraged, if you want to, to adjourn it. it is called 'adjourned in-court conciliation' - if you think there is any virtue of seeing the children in your office instead of again in the court - for something like that. There is no pressure, absolutely no pressure on us by the courts to resolve it that day. If you go back to [the] Registrar and say I want another week because I want to see the children in my office, he'll say fine. They both emphasize that: if the system needs a little more time to be effective, that is what it is all about. (court-welfare officer)

When the service mediated on court premises, the sessions were usually provided by one court-welfare officer working singly with the family and with the registrar. Adjourned mediation sessions conducted off court premises, in court-welfare offices, and family sessions conducted during court-welfare enquiries were, however, sometimes conducted by two officers.

The service used a focussed, non-therapeutic approach:

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4 Section 41 hearings were often mere formalities held very late in the legal divorce process, often as part of the granting of the divorce decree. Most 'hearings' only took a few minutes, many were attended by one party only, there was very little investigation, and the vast majority resulted in the order sought: G. Davis, A. MacLeod, and M. Murch (1983): 125-145; M. Dodds (1983): 229-237; J. Eekelaar (1982): 63-70; J. Eekelaar, E. Clive, K. Clark and S. Raikes (1977): paras. 3-4; S. Maidment (1976a): 195, (1985b): 237; S. Maidment (1984) 159-178.

5 After this study was completed, Edmonton and Brentford County Courts instituted a process encouraging early settlement of financial and property disputes in family law cases. See: G. Rose and S. Gerlis (1991): 92-3. For a brief description of a similar process initiated earlier in the Croyden County Court, see chapter 3. Essentially these are pre-trial settlement conferences conducted by registrars that are designed to encourage disputants' lawyers to settle their cases prior to trial. Generally court-welfare officers are not involved.

> We prefer not to get into all that hogwash about their mom's and dad's marriages. We need to get back to the children, to get them down to the nitty gritty right away. We don't go in for too much of that because it takes you off track. You are getting into therapy then with all the soul searching. You are really trying to get them to be practical and to think about arrangements for the children. A little bit [of therapy] might creep in but it should only creep in by the way, not as a focus. It is so easy to swing into something different [from mediation] and then you have used up a whole afternoon. (court-welfare officer)

MCWS maintained confidentiality of mediation sessions. With extremely rare exceptions, an officer involved with a family for mediation, was not involved in the preparation of a court-welfare report on the same family. While the service often used family meetings and sought settlement of outstanding issues during welfare enquiries, they were careful to emphasize the differences in the two processes:

> I would keep that word [mediation] right out of it. We will call in the parties to see if there is any room for agreement but I would never use the word 'conciliation' when doing a court welfare report. They are two very clear, separate processes ... [mediation] is a voluntary process where the information is privileged and can't be repeated. Anything that goes on in a court welfare report is not ... I work toward getting them to agree . . but I would never say I conciliated and got an agreement. I would say during the process of preparing my welfare report and during the course of my enquiries, I called Mr. and Mrs. Bloggs into the office and eventually we were able to work out an agreement. (court-welfare officer)

> I use a conciliatory approach but I'm now very clear and point out to people that my main task is to investigate and to report ... A typical family meeting, the way I do it, . . [is] very much like a conciliation. I start off by having the whole family in: explain the process and the agenda for that particular meeting, make introductions. My colleague and I would then together see the mother and father separately - we [the conciliators] stay together [when interviewing the parents separately]. [We spend] one half hour with each and maybe also with the children and then come all together and say what has been said in the individual meetings. [We] point out areas of disagreement. If at all possible I do make some attempt to see if they [the disputes] can be overcome but failing that I tell them what further enquiries I will need to make such as contacting the health visitors, schools, relatives, neighbors. If there is no agreement very soon, I switch to investigation. I mean I still try later, after I've done all the investigation, I may have the family in again and feed back all the information ... Up to the final moment we try to avoid them going through the court process. (court-welfare officer)

These matters were common to all three MCWS offices. We turn now to a description of the differences among the mediation services provided by each office and to an examination of how each services fit into the legal process.

The Acton Divorce Unit:

In 1987 this unit was staffed by three full time and two part-time court-welfare officers who provided services to the Brentford and Willesdon County Courts. Like the other Middlesex court-welfare offices, this unit shared premises with probation. They did, however, have a separate phone line which identified the unit as a court-welfare rather than as a probation unit. The offices were located in a modern office building. Once inside, the reception was courteous and pleasant but doors in the hall were barred by predominantly displayed security locks. This gave a criminal feel to the premises. The officers had, however, done what they could to make their personal offices comfortable for family clients by adding wallpaper and appropriate decoration. This helped to soften earlier impressions.[6] All family meetings were held in the officers' individual offices.[7]

In 1987 this service was not as involved in mediation as were the other Middlesex court-welfare units. Neither of the courts they served had formally incorporated mediation into the normal court process. The Willesdon County Court heard family law cases on Tuesdays and Fridays. It also had section 41 hearings once a month. Court-welfare officers from the Acton service were available on the court premises on those days and at those times to provide on the spot mediation services if and when requested. The court's use of this service was described to me as follows:

> They [the Willesdon County Court] have a divorce day on Tuesday and one on Friday and we go along and make ourselves generally available. Depending very much on the judge, this will determine whether of not

6 When I returned to these offices in the summer of 1988 I was pleased to note that the security locks had been abandoned and that the officers had acquired the use of a large, bright, pleasant room for their family meetings.

7 See footnote 6.

> we will be used. One judge, you go and knock on his door and he'll go over the list and say, "You might look at this and this is a case where you might see if you can get a consent order," so we scurry around. [*Are these mainly section 41s?*] No, not necessarily. Willesdon only has one [set of] section 41 [appointments] per month ... . One of our judges at Willesdon will stop a case during hearing and say, "from what I've heard so far, this sounds as if the welfare officer might be able to help by conciliating" and he says, "go out with the court welfare officer and see if you can get any agreement". (court-welfare officer)

In addition mediation was provided earlier in the legal divorce process if requested by a registrar but my impression, from my interviews with the court-welfare officers serving this court, was that much of the settlement work they were doing was occurring very late in the legal divorce process: immediately prior to or even during hearings to grant the divorce decree. Thus these court-welfare officers were providing a service resembling pre-hearing negotiations conducted by lawyers at the doors of the court, except that the process included both parties in face to face negotiation rather than the lawyers doing the negotiation for them:

> [*Do you see the parties together or .?*] #1: It depends on the time. My tendency is to get the two parties together and to shift the lawyers out. It may involve interviewing the children but otherwise it is just sticking with two people. . . #2: I tend to do it by myself without the lawyers and then bring the lawyers in [at the end] and then get them to draft the order. #1: Yes, that is what I do, I include the lawyers at the end. (two court-welfare officers) [8]

The court-welfare officers reported that children were not normally in attendance during the proceedings the court-welfare officers attended in this court. Consequently they were seldom included in the 'mediation' sessions. In 1987 the Willesdon County Court did not normally make use of 'adjourned in-court' mediation so most of the officers' conciliatory work was being done on an ad hoc basis when requested by the court or as a preliminary process during the court-welfare enquiry process:

> #1: I see the very first meeting for a court-welfare report as being an assessment of whether this couple has the capacity to discharge an agreement; discharge the anger and work together or whether they can't

8 As we shall see, only one mediator in Greater London reported regularly including lawyers in the mediation process.

> do that; and then there may be a process by which they can start reframing the problem and working for the children. [*Do you take a conciliatory approach?*] #2: I test it out because I see it as desirable that the parents take the power if they can. I take a positive line to get them (to an agreement) but not too far because that actually involves putting pressure on them. If they see the court process, the fight in court as expressing what they want, then they must have that. (two court-welfare officers) [9]

We turn now to the services this court-welfare unit provided to the Brentford County Court. In 1987 this court was staffed by two registrars, one on a full and the other on a part-time basis who were assisted by one full-time and two part-time court-welfare officers. Like Willesdon County Court, Brentford County Court had not made mediation a normal part of its court procedure. Both the presiding judge and the full-time registrar reported that the court was very busy leaving them little time to add any extra procedures. The other reason the court had not instigated in-court mediation was the fear the process would lead to delays in the processing of disputes. Most in-court mediation sessions in Greater London were conducted by court-welfare officers with the preliminary assistance of a registrar. This court felt it would be necessary to schedule families who had been through mediation with one registrar before another registrar for hearing[10] should a registrar's adjudicative assistance subsequently be required. Because the court had only a limited number of registrars available to it, it was felt that this scheduling would lead to delay.

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9 While the officers might include conciliatory processes within the welfare enquiry process, they were also careful to point out that the two processes were quite different. See: the comments of several of the Middlesex court-welfare officers about the differences between the two processes in the section titled 'Overview of the Middlesex Court Welfare Service'.

10 a) The courts in Greater London commonly assured disputants that anything they said during in-court mediation could not later be held against them in court proceedings. Given the fact that admissions were often made and concessions often offered to the registrar during in-court mediation sessions, the practice of holding any future hearings before another registrar would appear to be a good one.

b) Registrars of the County Courts and of the High Court hear and decide most matrimonial property and financial applications: W. B. Baker, J. Eekelaar, C. Gibson, and S. Raikes (Oxford: ISSN 0309-6408): 6; pursuant to the M. C. R. 1977, rule 77. Registrars also, with the exception of the formal pronouncement of the divorce decree and the obligations of judges under section 41 of the Matrimonial Causes Act 1973, process undefended divorces under the Special Procedure: [M. D. A. Freeman (1983a): 193-196; S. Cretney (1984): 181-186]; grant interim orders, determine the extent of access if the question of access is not in dispute, and grant consent orders concerning child custody, care and control, and access: [S. Cretney, ibid.: 398; M. C. R. 1977, r.92; Practise Direction (Child: Application to Registrar) [1977] 1 W.L.R. 1226]. They also handle procedural matters.

Instead the registrars tried to schedule directions appointments[11] and other matters which might give rise to a request for mediation, on the same days a court-welfare officer was available in the court building for section 41 hearings. If, during his directions hearings, the parties or their solicitors sought mediation, the registrar had the court-welfare officer called down from his or her attendance at the section 41 hearings being held before the judge, to provide mediation services to disputants appearing before him.

The directions appointments held before the registrar of Brentford County Court were not very different from the pre-mediation sessions conducted before registrars in the other courts. There were some differences, however, the first being that mediation was not positively encouraged by this court. It was available only on request of the disputants. While arguably the lack of pressure to engage in mediation in this court ensured that the process was truly a voluntary one (an assertion that should be questioned in the other courts) it also led to very infrequent use. Court officials and the court-welfare officers confirmed that requests for mediation arising from this court were rare.

Children were not normally in attendance at the directions appointments held before the registrars in this court. Normally these appointments included only the registrar, the disputants and their legal advisors. If the appointment lead to a request for mediation, therefore, the mediation would normally be conducted on the court premises without the participation of children. Very rarely, upon disputant and court-welfare officer request and consent, disputants might be referred from the directions appointments to the offices of the court-welfare officers for 'adjourned in-court' mediation appointments.[12]

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11 Appointments held before registrars to ascertain the processes to be followed in order to prepare the case for trial.

12 On the day I attended proceedings in the Brentford County Court, one of the cases was adjourned for mediation at the court-welfare service's offices but I was informed by the court-welfare officers that the use of this procedure was very rare.

Meanwhile the same court-welfare officer was also in attendance for section 41 hearings before a judge upstairs in the court building. The services he or she would be providing there were: speaking to the children for the court to ensure that the arrangements being made by the parents were satisfactory or the best that could be arranged in the circumstances, and providing on the spot mediation should such services be needed. I was informed by the court that, while children did not normally attend the formal part of section 41 hearings, it was fairly common for them to be brought to and available on court premises during these proceedings. Consequently children might be interviewed or otherwise involved in mediation sessions arising during these appointments.

The majority of section 41 hearings did not, of course, lead to mediation. Most cases proceed routinely on an uncontested basis.[13] Others, involving major problems or disputes, were scheduled for hearing before the judge. Only those with minor disputes were invited by the judge to speak to the court-welfare officer in attendance to see if they could settle the matter. Requests for on-the-spot mediation also arose occasionally during the course of injunction hearings if both parties were in attendance and if the case involved difficulties concerning children.

These 'mediation' processes, like those at Willesdon County Court, were occurring very late in the divorce process. The mediation being offered here was, therefore, similar to negotiations conducted by lawyers at the doors of the court rather than a true alternative to the adversarial, litigation process. This similarity was even be greater than one might otherwise expect as one of the court-welfare officers serving this court included the lawyers in the process:

> I have the two parties together with their legal advisors because experience has taught me, when I've not had them in and have got an agreement, and they [the disputants] go and see their two lawyers who promptly screw it up. . . I bring them altogether and get the lawyers to

13 See footnotes 2 and 3 for a description of the normal section 41 process and for references to some of the research in the area.

> draft up the consent orders because I am suspicious of lawyers. (court-welfare officer)

This was the only mediator in Greater London who reported regularly including lawyers in the mediation process. There are advantages of this practice, for example: balancing the power between the disputants and between the disputants and the court officials; ensuring that the choices being made by the disputants are informed ones, that all the necessary details have been considered, and that the legal implications of the arrangements being proposed have been fully considered; but the inclusion of lawyers can also be expected to remove the disputants one step further away from responsibility and power to make their own decisions. Does this mean that lawyers should be excluded from in-court mediation? G. Davis and K. Bader,[14] found that disputants who had been through in-court mediation were critical of the exclusion of their lawyers from the process, feeling that without lawyers, they were inadequately protected. As we move through our description of mediation services in Greater London, we shall find that, as a general rule, the in-court mediation being described was more directive and pressure-laden than was out-of-court mediation. The degree of pressure experienced by disputants during the in-court mediation sessions studied by: G. Davis and K. Bader,[15] and the University of Newcastle Upon Tyne[16]; lead one to wonder if courts providing in-court mediation and excluding lawyers from the process were offering disputants due process or if, in effect, they were denying disputants access to the courts and offering instead the judgements of court-welfare officers. Might the inclusion of lawyers during in-court mediation prevent coercion and protect disputants' decision-making power or would their inclusion move the disputants even further away from the decision-making process? We might wish to think about this question as we move through our description of the other in-court mediation services in Greater London.

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14 (1985a): 45.
15 (1985a,b), (1983b): 355, 403.
16 (1989): 285-297.

The Uxbridge Divorce Unit:

Now that we have looked at the connections between the Acton Court-Welfare Divorce Unit, mediation, and the courts, we turn to the Uxbridge Divorce Unit which operated quite differently. In 1987 this unit had two full-time court-welfare officers assisted on a part-time basis by the chief court-welfare officer for Middlesex. By the summer of 1988 another, full-time court-welfare officer had been added from the Highgate unit and a new chief officer had been hired to administer this and the Acton office.

The Uxbridge County Court was the only court served by this court-welfare unit. Uxbridge County Court began to offer in-court mediation as a normal step in the court's processes in 1983. The court administrator listed all disputes involving child custody, care and control or access, including, when appropriate, applications for guardianship, for in-court mediation.[17] This court did not normally refer people from section 41 hearings to in-court mediation, perhaps because one of the unit's court-welfare officers was available during section 41 appointments to iron out minor disputes.[18] Most of Uxbridge Divorce unit's mediation was conducted on the court premises during Uxbridge County Court's formally scheduled in-court mediation appointments.

In 1987 in-court mediation was held at Uxbridge County Court every second Wednesday. All cases (by agreement with the court-welfare service, no more than four cases were listed on any one day) were scheduled to appear at the 10:30 a.m.. Two court-welfare officers were available at the court to assist the disputants. Therefore, while the registrars might introduce mediation to as many as four sets of parents or guardians of children, each court-welfare officer would do a maximum of two cases per day. Usually all cases were completed by one o'clock or two o'clock in the afternoon.

17 The court reported that some of the guardianship cases were occasionally inadvertently missed and sent directly to the judge.

18 Any mediation conducted in the course of section 41 appointments tended to be very limited and brief.

This scheduling was important. Greater London's mediators (both those working in and those working independently of the courts) reported that mediation requires a tremendous level of mediator concentration. The mediators said their own effectiveness as mediators decreased with the number of mediation cases they were required to handle during the course of a day. The mediators commonly mentioned two or three mediations per day as the maximum they thought a mediator ought to handle. For example, several in-court mediators commented:

> (A change in speaker is identified by a change in number) #1: When we do have six [in-court mediation sessions] on the list and we are both there [doing three cases each], it is a very full morning. We come away....#2: just to get our coats... #3: It is exhausting ... #1: When we meet with the whole family, it might take one and one half hours of your time but you try doing more than two of those a day. At the end of a three hour day you've got a headache - because there is a topping up process... #4: yes... #1: - particularly on your own. It is a lot easier in pairs, but on your own you [quickly] reach your limit.." (three court-welfare officer conciliators)

Greater London's mediators suggest that the number of sessions Uxbridge County Court was requiring of its mediators was appropriate.

In order to gain the attendance of disputants at the Uxbridge in-court mediation appointments, the court sent out a notice of the appointment and a letter seeking the attendance of the disputants and any children involved who were 9 years of age or older. Solicitors were asked not to file affidavits until after the mediation appointment. (This request was made by all the courts conducting in-court mediation but all had trouble gaining solicitor compliance.) It is doubtful that disputants receiving these notices from this court viewed their attendance at these appointments as voluntary, most would have experienced their participation in this court's in-court mediation as involuntary.[19] Similar notices were used by all of the court based mediation services.

When the disputants appeared for their 'mediation' appointment they waited in a common waiting room. The room contained few amenities. Disputants were forced

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19 See: G. Davis and M. Murch (1988): 112; Newcastle Report (1989): 286.

to share the waiting area with other parties to their dispute. Undoubtedly many had similar complaints about this court's premises as those given to M. Murch, M. Borkowski, R. Copner and K. Griew during their study of the overlapping family jurisdictions of the Magistrates' and County Courts and those given to the University of Newcastle Upon Tyne researchers during their study of mediation services in England and Wales.[20]

The three registrars serving this court handled their appointments differently. One of the registrars held his appointments in the court room, another in a large, book lined office. The registrar using the court room for mediation appointments occupied seating at a higher level than did the disputants and their lawyers thereby, perhaps inadvertently, stressing his position of authority. The disputants and their solicitors sat together in a line near the front of the court room while the court-welfare officer sat off to one side, behind the others. The registrar and solicitors isolated areas of dispute. The disputants did not say very much at this point, perhaps because of the formal court setting. G. Davis, A. MacLeod, and M. Murch[21] found that disputants are intimidated by judges in the trappings of the formal court room.

After isolating, with the lawyers, the matters in dispute, this registrar then introduced the court-welfare officer and advised the parties that people become bruised by divorce and even more by court hearings and that it would be far better for them to make their own arrangements so they could avoid having arrangements imposed upon them by the court. The disputants were then invited to go out to speak to the court-welfare officer to see if they could work things out. The matter was then adjourned.

It is doubtful many disputants would feel able to refuse a registrar's 'invitation' to discuss matters with the court-welfare officer, when the alternative was presented in this manner. While was clear from viewing this process that the registrar's

20. M. Murch, M. Borkowski, R. Copner, K. Griew, (1987) 57-62; University of Newcastle Upon Tyne (1989): 299-304.

21 (1982a): 40.

intention was simply to encourage the disputants to try to resolve their dispute in a co-operative rather than an adversarial manner, the threat of being bruised during court hearings made the alternative sound ominous. The University of Newcastle Upon Tyne researchers found that disputants experience this type of comment by registrars as court disapproval of them for submitting their dispute to the courts or as pressure to reach agreement.[22]

Another registrar in this court preferred to hold his part of mediation appointments in his office. Here the seating arrangements were less formal. The registrar, disputants, lawyers and court-welfare officer sat informally around two desks placed together along their lengths. We know from the research of G. Davis, M. MacLeod and M. Murch;[23] M. Murch, M. Borkowski, R. Copner and K. Griew;[24] and the research of the University of Newcastle Upon Tyne (hereafter called the *Newcastle Report*)[25] that family law disputants are intimidated and critical of the court room environment and appreciative of warmer, more relaxed surroundings. It might, therefore, be expected the physical arrangements made by this registrar for his mediation appointments would quell some of the consumer criticisms of in-court mediation found in the *Newcastle Report*.[26]

With the exception of the court setting and the exact wording used to encourage the disputants to try to resolve their dispute with the assistance of a court-welfare officer, the preliminary process before the registrar was common to all Greater London in-court mediation processes: the registrars used the first part of the appointment to isolate areas of dispute and to encourage the parents to talk to the court-welfare officers. The solicitors and the registrar did most of the talking and discussions were limited to a bare recital of the issues in contention and, if necessary, the legal

22 (1989): 285-298.
23 (1983b): 124, 134.
24 (1987):(1987):(1987): 63-68.
25 (1989): 300-304.
26 Ibid.

positions of the parties with respect to existing orders and applications. The merits of either party's position were not usually discussed. These preliminary proceedings were brief, only five to ten minutes long. The proceedings were then adjourned to allow the disputants an opportunity to discuss their dispute privately with the court-welfare officers. Between preliminary mediation appointments, the registrars were busy hearing other cases and doing paperwork unrelated to mediation.[27]

In spite of Uxbridge County Court's request that children attend mediation appointments, they often did not do so:

> It is flexible. We don't see many children in court. The letter sent out with the appointment notice, I think it asks for children . . . to attend but it seems [people] don't take any notice. I have my doubts about children being brought into the court setting. I think there is a case for not holding them [mediation sessions involving children] in the court building. [They should be held] some place that does not have such an officious feel. (court welfare officer)

Many of the in-court mediation sessions in this court were consequently held with the parents or guardians only. If it became apparent to the court-welfare officers during mediation, however, that the attendance of the children was going to be necessary, the officers asked the registrar to adjourn the mediation to another in-court date when the children could attend or to refer the disputants and their children to the court welfare officer's offices for further 'adjourned in-court' mediation sessions. When children were brought to the court premises in accordance with the notice, they did not normally attend the proceedings before the registrars but would usually have a chance to speak to the court-welfare officer privately at some point in the process.

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27 I am talking here about registrar participation in formally scheduled mediation appointments. We should not forget that judges and registrars regularly engage in settlement seeking during judicial processes: H. Edwards and J. White (1977); M. Galanter (1985) 3-10, (1983): 44-45; J. Wall and D. Rude (1989): 190-212; J. Wall and D. Rude (1985): 47-63. During the course of my research I had occasion to observe several of the registrars handling other cases in their judicial capacities between mediation sessions. I found that on occasion, particularly if the disputants were unrepresented, some of these registrars offered a process which was more like mediation than adjudication: the disputants, were given the option of having the court decide the matter in dispute on the basis of the evidence presented if they wished or the option of arriving at their own solutions. To this end the disputants were encouraged to discuss possible options and compromises, to address their comments to each another, and to reach their own solutions.

Several of the private mediation sessions with one of the court welfare officers and the disputants were observed in this court.[28] The room used for the private mediation sessions was small, windowless but private. It was tucked into one corner of the court's common waiting area and contained a long table surrounded by many chairs. The room was bare but not intimidating. While the number of cases attended with court-welfare officers and their clients after the appointment with the registrars does not warrant firm conclusions about the approaches used by court-welfare officers in general, the structure given to these in-court mediation sessions by this officer warrants description.

The officer first explained the ground rules of the mediation process: that nothing said in the sessions could be used against the disputants later and that the process was confidential. He then explained that the purpose of the meeting was to enable the disputants to make their own agreements about their own children rather than having one imposed on them. This was followed by a description of the process that he would use: each of disputant would have a chance to explain the situation as he or she saw it without interruption from the other and this would be followed by joint discussions. Then he gave them information about the normal processes the court would follow should they fail to reach agreement. This information was given in a balanced, non threatening manner.[29]

After setting the stage and before moving on to the individual explanations, the officer sought noncontentious information from the parties such as names, addresses, telephone numbers, solicitors' names and the children' names and birth dates. In addition to providing the officer with needed information, this early gathering of non

28 I was only allowed to do this in three courts. Whenever I observed the court-welfare officers working alone with the disputants, it was on the clear understanding that the purpose of my involvement was simply to be able to describe the process, disputants were not to be identified.

29 If great care is not taken to give this information in a balanced way, for example, if the adversarial process is described in very negative terms, the alternatives to reaching an agreement can sound very frightening. Some disputants experience this as pressure to reach agreement: Newcastle Report (1989): 292-298.

contentious information also served two other purposes: it started the disputants talking and helped to set them at ease.

This information gathering was followed by the individual, uninterrupted explanations of the situation and dispute as seen by each parent. When either parent interrupted the other, the officer firmly reiterated the ground rules and assured the person doing the interrupting that he or she would be given a similar right to speak without interruption in a few minutes. After each disputant had described his or her worries and concerns, the meeting proceeded to a round table discussion of the matters in dispute. Throughout the process and particularly during the round table discussion, the officer used a variety of dispute-resolution techniques such as the use of the phrase, "Am I hearing," followed by the re-phrasing of a disputant's position or concern in positive rather than negative terms; the clarification and accentuation of areas of agreement; and summarizing of disputant positions.

This private part of the in-court mediation session with the court-welfare officer could take as long as two hours:

> [*How long do you normally have with the disputants?*] One and a half [hours] - [there is] no set rule for time. We are allowed as long as it needs though if you can't bring it to conclusion within two hours you are probably going around in circles in any case. (court-welfare officer)

The sessions might end with full agreement; a time limited agreement whereby the parents would try a possible solution on a trial basis without incurring a long term commitment; a partial agreement combined with an agreement there was a need for a welfare enquiry to investigate other concerns; an agreement that further mediation sessions were needed because the disputants needed more time to talk, or to enable the participation of children or other family members; or an understanding that no agreement was possible and the matter would need to be adjudicated. When the court-welfare officer developed concerns about the welfare of the children he or she normally asked the registrar for an order for a welfare report.

At the end of the private session, the officer or the disputants briefly informed any legal advisors on the premises of the outcome of the private meeting and if there had been no agreement, what the court welfare officers' procedural recommendation to the registrar would be. Then everyone (with the exception of any children in attendance) reappeared before the registrar.

When the case was returned to the registrar, if it had not been resolved at this point, some registrars in some courts became actively involved in settlement seeking. Others felt judicial pressure to be inappropriate to mediation and were careful to ensure that they exerted none. It would be inappropriate to describe settlement pressures exerted by registrars, or the lack thereof, on a court by court basis as the limited number of cases observed before each registrar would not justify making comparisons among them.[30] In-court settlement pressure by registrars in Greater London is, therefore, discussed separately at the end of this section under the heading 'In-Court Mediation and the Judiciary'.

When everyone reconvened before the registrar, the court-welfare officers in this court limited their comments to the terms of any agreements reached; proposals for adjournments to allow further mediation appointments to be held at court-welfare offices or in-court; requests for welfare reports; or to comments that no agreement had been reached. The registrars then, depending on the circumstances of the case, either engaged in settlement seeking themselves or made the orders requested.

In addition to in-court mediation, this unit sometimes, at the request of Uxbridge County Court, provided mediation at the unit's court-welfare offices. Thus a description of the service's offices is warranted. The Uxbridge Divorce Unit, like their Acton colleagues, shared office premises with probation but had a separate phone line and stationary. The Uxbridge office did not give one the feeling of a criminal

30 The few cases I observed before each registrar does not enable me to make generalizations about any particular registrar's behaviour.

institution. It was bright, new, in a modern brick complex that included probation services and, in separate wings, the Uxbridge Magistrates' and Uxbridge County Courts. Once inside the building, the atmosphere was pleasant. The offices were arranged around a large common waiting area filled with plants and light from many windows. The court-welfare officers used a large, many windowed room for family interviews. Although criminal and family clients might be mixed in the waiting area, the open floor plan minimized any security problems. My impression was that families coming to these offices would feel quite comfortable in the premises even though the premises were shared with probation services.

As we saw in our introduction to Service #1, this service did not mix mediation and court-welfare investigations, although it did sometimes include conciliatory family meetings in the investigation process.

Service #2: Central London Court Welfare Service[31]

We turn now to a description of another court-based mediation service. In 1987 the Central London Court Welfare Service employed one senior and ten court-welfare officers. This service and the Family Courts' Service at Balham were the only specialized court-welfare units operating in Inner London. Family and domestic matters arising in other courts in Inner London were being handled by probation units. The vast majority of the family work was, however, being done by the two specialized court-welfare units. R. Gray, D. Hancock and J. Hutchings found that only one-fifth

31 Except where otherwise noted the information which follows was derived from interviews conducted in 1987 with nine court-welfare officers, two interviews with the chief court-welfare officer of this service, attendance at four in-court mediation sessions with one registrar at the Principal Divorce Registry, several attendances at Sommerset House to view in-court mediation facilities, and interviews with two of the Registry's' fourteen registrars. I was asked by the Lord Chancellor's Department to limit my examination of this service because of the courts' involvement in research being conducted by the University of Newcastle Upon Tyne, Conciliation Unit. For this reason my court attendances and discussions with registrars from this court were very limited. Most of my information is, therefore, taken from interviews with the court-welfare officer/mediators involved. When this service was contacted again in the summer of 1988 it was under considerable pressure from within the Probation service. Consequently I was not able to conduct an update interview with the chief officer of the service but I was able to interview one of the service's senior officers.

of the requests for domestic and family court-welfare reports arising in Inner London were coming from the Magistrates' Courts.[32] They estimated that this meant that probation officers in Inner London were each only doing, on average, between one-half and one family court-welfare report per year.[33]

In early 1987 the Central Court-Welfare unit operated much like a national office. It conducted court welfare enquiries for the Principal Divorce Registry and High Court in some cases even if the disputants lived outside of the London area: [34]

> They [the court-welfare reports] are supposed to go out to geographic areas on the basis of where the children are settled but we may have to do it here maybe because other offices have too much work, or on the grounds of confidentiality of addresses, or there may be a local authority involved and they want us to do it ... If one party is in one part of the country and another in another we tend to retain it here because it is more economical because then the officer who did the report is nearer if he or she is needed for the hearing. But we are not - although the courts like to think of us as a national unit, we are not. We are part of Inner London [probation service] which is now saying, "why should we be doing reports for other probation areas?" ... The preparation of reports needs to be renegotiated nationally by the senior Probation officers and the President of the Family Division. (court-welfare officer)

By the middle of 1987 the expense involved in having these court-welfare officers conduct welfare enquiries outside of London was increasingly being questioned and the service was coming under pressure from the probation service to send all requests received for welfare enquiries to the probation unit serving the area in which the children lived.[35] In 1986 1431 requests for court-welfare reports passed through this court-welfare unit for allocation. The unit itself completed somewhere between 499 and 522 of these.[36] The remainder were forwarded to whichever probation or court-welfare unit covered the area in which the child(ren) involved resided.

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32. Inner London (1987): 7.
33. Ibid.: 7.
34. Ibid.: 22.
35. Ibid.: 22.
36. Ibid. p 7. While Gray et. al.'s research showed the unit completing 499 reports in 1986, the service's internal records suggested that the actual figure was 522.

In addition to the primary task of conducting welfare enquiries for the courts and channelling welfare enquiries to other probation services, this unit provided mediation on an in-court basis at the Principal Divorce Registry with the assistance of registrars during scheduled mediation appointments. Occasionally the officers also provided limited in-court, on the spot, mediation to disputants attending section 41 appointments before the High Court judges if the disputes were limited to minor details. (More serious disputes were referred into the Registry's in-court mediation scheme, a court-welfare report was ordered, or the case was set down for trial.) Even more rarely an officer might offer a particular family an additional mediation appointment at the court-welfare offices:

> Officers have tried it [offering additional mediation sessions off the court premises] once or twice and generally speaking they have regretted it. That isn't our model. Sometimes officers have offered some on going appointments but I do think it conflicts with the model we are using and by and large the officers don't do it. (court-welfare officer)

> Mostly we don't [offer out-of-court mediation appointments] except in exceptional circumstances because the trap is we think it will only take two hours and it may take three days and we can't do that, not when we have twenty-five [other] cases waiting for [court welfare reports for] two months. (court-welfare officer)

The vast majority of the unit's mediation was conducted for the Principal Divorce Registry in Somerset House. In January of 1983, as a pilot scheme, the Principal Divorce Registry began offering mediation appointments as a normal part of court processes.[37] That service, with minor changes,[38] was still operating in 1987.

All applications for custody and access to children were automatically scheduled for mediation appointments in the Divorce Registry unless on application[39] a registrar was convinced that the process would be futile. Cases also came to in-court

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37. Practice Direction (Family Division: Conciliation Procedure) [1982] 1 W.L.R. 1420.

38. Practice Direction (Family Division: Conciliation Procedure) (No.2) [1984] 1 W.L.R. 1326; Practice Direction (Children: Inquiry and Report by a Welfare Officer) [1986] 2 F.L.R. 171.

39. See: Practice Direction [1984] ibid.

mediation upon the referral of High Court Judges uncovering disputes during their section 41 hearings: [40]

> We are not doing many section 41 satisfaction reports now. We used to do a lot of reports on that but most are referred to the conciliation list now (court-welfare officer);

and from registrars handling wardship cases, if case did not involve social services:[41]

> [We refer wardship cases to mediation] only when the local authority is not involved ... Each case is allocated to a particular registrar and it remains with that particular registrar throughout, until a final order. Any further problems will always go back to that registrar unless there is an emergency ... In wardship when you issue your application for access, it does not automatically go to conciliation. You go before a registrar who hears the parties and decides whether or not it is appropriate to list it [the case] for conciliation. But the registrar who is handling the case will not be the registrar who does the conciliation. (registrar)

Two sets of mediation cases were scheduled before two registrars at the Principal Divorce Registry on Mondays and Tuesdays each week. One court-welfare officer was provided by the court-welfare service to each registrar to assist him or her with these appointments. The Central London Court Welfare Service (CLCWS) and the Principal Divorce Registry maintained clear boundaries between mediation and their investigative/adjudicative processes. Registrars who participated in mediation with families were not subsequently involved with the same families in a judicial capacity. Similarly if a court-welfare officer discovered during the course of the mediation appointments that he or she had previously been involved with one of the mediating families in an investigative capacity, that family was referred to the other registrar and court-welfare officer on duty for their mediation appointment. Nor did court-welfare officers involved in in-court mediation subsequently prepare court-welfare reports on the same families.

During the first part of 1987 families appearing for in-court mediation were scheduled to appear before the registrars every forty-five minutes. Later in the year

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40. Ibid.
41. Ibid.

families were scheduled to appear before the registrar every one-half hour. Typically six cases were listed daily before each registrar.[42] As each court-welfare officer worked singly with each registrar, if all these cases needed assistance, an officer might be expected to handle six and sometimes even seven mediation cases in one day. This is far in excess of the maximum number of cases Greater London mediators thought mediators should handle on a daily basis.[43] No doubt this contributed to the stress and pressure under which these officers worked:

> We now offer one half hour. It has been cut from one hour and even that was too short. [There is] tremendous pressure and it is not good enough. (court-welfare officer)

This tight scheduling of cases did not necessarily mean that all families were limited to one-half hour or forty-five minutes, however. Some cases were handled with little discussion because one of the parties did not appear, because the children were not in attendance or because the case had already been settled. This sometimes gave the officers extra time to spend with other families. These cancellations were, however, hit and miss. If all cases were active the officers were under a great deal of pressure:

> In a great many cases either one party doesn't turn up or they don't bring the children when they should be bringing the children for the welfare officer to see. So very often you can sit there and then the parties come in and you can't really deal with the case ... Certainly I've had days when you sit there and nobody comes and you are waiting and really killing time. Then there have been days when each and every case has been a substantial one and then you can easily spend more than three-quarters of an hour with these people and then, in a way, you feel under a great deal of pressure. So I can't really see a way of modifying it satisfactorily. (court-welfare officer)

> All this can't happen in 30 minutes. It only works, if it works at all, because some cases don't come and some don't take very long. I think they set aside the 30 minutes with the expectation that some cases will take an hour and some won't come at all. They are in trouble if everybody comes and they [the cases] are complicated. (court-welfare officer)

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42. Six was most common, not the maximum.

43. See Service #1 at Uxbridge.

While several officers were able to recall specific families with whom they had spent several hours during in-court mediation and while some officers said they extended the duration of mediation when this appeared to be productive;

> My own approach is that if I can see I am likely to get an agreement, I don't worry about the clock too much and give the parties as long as needed. (court-welfare officer);

the officers were normally working under the influence of 45 or 30 minute time limits:

> The appointments are at one-half hour intervals. It was 45 minutes. Sometimes people are late or don't turn up so they don't stick rigidly to the time table but you know that is roughly what is expected. (court-welfare officer)

Other exceptions to the normal time restraints imposed by the Central Divorce Registry's mediation process were settlement discussions between both lawyers and the disputants. As long the assistance of a court-welfare officer was not required, those discussions could continue as long as needed:

> You can go on and on and generally what they will do is say - it depends on the registrar - if you have a really good discussion for three quarters of an hour and . . if [the registrar is] really good . . they will say, "I have someone else waiting, . . do you think it would be useful if you carry on the discussion? [In] one [case] recently it was decided we would carry on the discussion in another room: both solicitors and the parties. We did that and we managed to get to the stage where we had arranged some access and we agreed to have another meeting in two months time at my office to see if we could get any further. (solicitor)[44]

Other exceptions were families given more than one in-court mediation appointment to enable them to try new arrangements on a trial basis or to slowly move the parents towards a full agreement:

> We can arrange for that [the same] court-welfare officer to sit with me on an adjourned conciliation appointment and in the meantime make a temporary order - or see how the temporary arrangement works and it has sometimes taken me three to four conciliation appointments to get a final order....[It can take] a long time and a lot of patience ....(registrar)

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44. This is a quote from a solicitor/mediator but is a description of her work as a solicitor within the 'adversarial' process. The quote illustrates the similarities between the activities of family lawyers engaged in the practice of family law and those of mediators. When mediation is contrasted with the 'adversarial' system it is often forgotten that the activities of judges and lawyers are often conciliatory, that they are not always adjudicative and adversarial. See footnote 27.

Solicitors were asked not to file affidavit evidence until the mediation appointments were over. The appointment became a directions appointment if the parties were unable to reach agreement. The parties, their lawyers and children over nine years of age were expected to attend.[45] Younger siblings could be brought at the discretion of the parents. On occasion this court insisted on the attendance of children even over parental objection:

> She [the mother] didn't want to bring the children. It was very difficult. Even my intervention was met with abuse, more or less telling me that it was none of my business -... Anyhow we controlled that situation by using the courts authority and conciliation was adjourned because I insisted that she bring the children. I told her firmly they were to come. On the next occasion she didn't turn up and I told her solicitor that I was sending the case straight off to a judge because she was obstructing the conciliation process ... On the third day the court-welfare officer said: "We have a problem. The children are here but the mother insists that those children won't be seen unless she is present and it is going to be impossible." I brought them in and said, "Thank you for coming", and before she could shout the court welfare officer had already gone out. The children were old enough to voice their own views and these children wanted to see their father. (registrar)

Normally children did not attend those parts of the mediation process held before the registrar, although on rare occasions they might be brought in at the end of the process to hear the conclusions reached. Children were normally seen privately by the court-welfare officer.

The first, preliminary part of the mediation appointments were held before the registrars in large book lined rooms. The parties (usually the parents though sometimes guardians or grandparents and sometimes step-parents were included) together with their lawyers were expected to attend before the court-welfare officer and registrar. Children did not normally attend this part of the process. They were expected to wait outside in the hall. The waiting facilities available to children in Somerset House left a lot to be desired:

> There aren't really facilities for it. There used to be a room where the children were asked to wait which was a large cavernous room with lots

45 In effect these sessions were not voluntary. For further comments, review service # 1.

> of chairs in it and nothing else and a good five minutes away. That was stopped because the children were sliding down the bannisters and could easily have killed themselves. So now they sit in the corridors, which is all part of the tension because the parties are there with their solicitors and the battle lines are very much drawn and the children work out where they are going to sit and how much they are going to acknowledge the parent they are not sitting with and it can be very tense. (court-welfare officer)
>
> I would like to have lots of equipment for the children to play with and to have someone in authority to keep an eye on things ... I don't think they should sit outside in the hall way ... I feel for the children because there are other cases going on and you have a long corridor and there are lots of people. (cwo/conciliator)

Clearly this is unacceptable. Children should not be left unattended in court hallways, particularly children in the midst of proceedings concerning the breakup of their own families.

The formal, preliminary part of the 'mediation' process held before the registrar observed in this court, was the same as the preliminary processes before the registrars working with service #1 (Uxbridge). Normally after the lawyers and the registrar isolated the issues, the parents were asked to speak privately with the court-welfare officer without the registrar and without their legal advisors to see if any agreement could be reached. This was not, however, always the case. The mediation process in the Central Divorce Registry varied dramatically from registrar to registrar:

> The process varies from registrar to registrar. They always start it off but then some leave it up to the court welfare officer and others participate themselves. They may have the court welfare officer go and interview the children while [they continue] working with the parents"....(court welfare officer)
>
> How it works depends very much on the registrar. You have ten different officers and fourteen different registrars constantly in different combinations. Some registrars tend to spell out what the problem is and leave the court welfare officer to get on with it. Some registrars tend to deal with the whole problem in the confines of their own room ... The general pattern is that the process starts with the registrar and court welfare officer sitting at one end. Some registrars are formal, others try to make it less formal ... Some registrars say, "Well generally I have found the less solicitors say in these sessions, the better" and invite the parties to come and sit next to him. Some take a very firm line and silence the solicitors. Others let the solicitors speak for their clients. It varies according to the circumstance. The registrar may decide in a particular

> case it is better to have the parties discuss the case right then and there ... others that it would be better to talk independently with the court welfare officer."...(court-welfare Officer)
>
> Some registrars take much less information before adjourning and one separates the parties and has joint discussions with the court welfare officer and each party in the conciliation room. One does the whole session in the room"....(registrar)
>
> I [court-welfare officer] usually start with a presumption that I will see the parents together ... Sometimes I won't see the parents - where my contribution is for me to see the child ... and feedback an independent view of what the child is saying. So there are occasions when I don't see the parents together other than with the registrar. (court-welfare officer)

Some registrars participated as co-mediators while others, like the registrars connected to service #1 (Uxbridge), were content merely to set the stage for mediation discussions with the court-welfare officer. When the Divorce Registry's registrars acted as co-mediators, most of the discussions (with the exception of child interviews, which were usually conducted by the court-welfare officers without the registrar) were carried out in large, book lined rooms. When the registrars adopted the latter method, the family's discussions with the court-welfare officer were held elsewhere.

Some of the rooms used by the registrars for the mediation appointments had smaller, adjoining offices. If these were available for a court-welfare officers' use, the officer talked to the parents and the children privately there. If adjoining offices were not available the parents and the children were lead by the court-welfare officers down the long, narrow corridors past scores of lawyers, witnesses, and parties waiting for their trials or hearings, to a large bare room some distance away:

> The other day I was taking a little girl upstairs to talk with her because we had no [adjoining] rooms [available] and there was this woman howling her eyes out here and another with red rimmed eyes there ... Children do see grownups cry but to see it in that setting knowing all this is going on and knowing that your life is also being affected. I felt it most unpleasant. I felt quite for this child ... It does look frightening for the little ones and there is no way we can circumvent it. (court-welfare officer)

Children attending mediation sessions at Sommerset House had no facilities, toys or supervision available to them. They were being forced to sit and wait in long, dark,

narrow corridors without their parents. This situation should not be allowed to continue. Either the court should not insist on the attendance of children, or it should provide adequate facilities for their care and supervision. While the majority of Greater London's in-court mediators thought children should be included in the mediation process in some way,[46] most questioned the suitability of court premises for that purpose.

When court-welfare officers did see the parents or disputants and children separately from the registrars, again the process varied. Most court-welfare officers discussed the matters in contention with the parents jointly:

> I've only had two occasions where the parties have refused to come in and talk to me together. We vary on that too. Some colleagues will interview one side and then the other and then offer an appointment together. I offer conciliation together automatically because, as I see it, that is the whole point of conciliation. (court-welfare officer)

others usually saw the parties separately:

> I do tend to see people separately first because I feel people want to tell you their own personal side of things and then when I see there is common ground I will offer ... [to continue the appointment] together ... You can get them together and discuss things together but some people don't want that and I don't think they should be coerced. I think they've said enough to each other before they've come and a lot of time and energy is wasted over bickering in front of you when in fact the time could be better spent in looking at the problem in dispute and how to resolve it. (court-welfare officer)

Still others offered the disputants the choice:

> I see them alone or separately. I usually give them the option ... The greater number would prefer to be seen on their own but that seems to be the choice when the situation is fairly new. When the couple has been divorced for some time and have remarried or whatever, then they seem more able to talk together ... The others are still smarting with the injustice [of the breakup] (court-welfare officer)

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46 Greater London's out-of-court mediators were less inclined to favour including children in the mediation process. There was much debate among Greater London's mediators about children in mediation. These debates are aired in Chapter 5.

The discussions with between the court-welfare officers and the parents were firmly rooted in dispute resolution although the form of dispute-resolution assistance being offered in this court contained elements of pressure and coercion:

> A purist would probably say what we are doing is not conciliation in the sense of just letting the parents work it out for themselves. There is a good bit of reality put in by the court-welfare officer and registrar. We might say, "If you want my honest opinion, here is what would happen if you went before a judge." Whether that is arm twisting or not. I don't know that you've got to change the name. I just mean it isn't just leaving the parents to work it out for themselves. There is a good bit of input from the court-welfare officer and registrar who are using their authority and experience to hopefully shove the parents on a bit from rigid positions. I don't think it is unfair but whether it is conciliation or not, is an interesting thought. (court-welfare officer)

> The biggest difference between the two [in-court and out-of-court conciliation] - obviously time and also if you are working out-of-court you are dealing with the hurt and anger more than in in-court, giving the parties more time to express themselves and to ventilate. I guess also the confines of the court. In-court has some authority. I am much more directive in in-court conciliation than I would be in out-of-court conciliation. It is a question of focus. (court-welfare officer)

The sessions were not intended to be therapeutic. Instead they were intended to settle or air disputes. One officer described the process this way:

> I try to bring the meeting to order, to steer it back [to the children], let them look at things and try to find out if we have a basis upon which to negotiate - because that is what we are basically doing: one party doesn't want access and one wants access, one wants it at such and such time and the other another. Unless we have someone who is just wavering and just has certain minor points which need to be thrashed out, custody is not going to be resolved in one-half to three-quarters of an hour but at least we can start clearing the air a bit. . but that is all you are going to do. If custody is really in issue it is a non starter. (court-welfare officer)

When children were in attendance, they would usually be seen by the court-welfare officer without their parents and without the registrar. If more than one child was involved, the children might be seen jointly with or separately from the other children depending on the facts of the case:

> I would be affected by what went on in the joint meeting. If the issue was one child being carried along by another then perhaps I'd see them separately. In general if there is time it is nice to see them separately because otherwise one of them tends to dominate, usually the older and the other just sits there smiling and nodding. (court-welfare officer)

The purpose of these discussions was to solicit the children's views and preferences:

> I have a lot of complaints about the facilities but I think it is essential to have the children there. If for no other reason because as a child gets older his preferences will increasingly be respected by the courts and hence they need to be taken into consideration by the parents. (court-welfare officer)
>
> I ascertain their views and feed that back to the parents and obviously to the registrar. (court-welfare officer)

The children did not usually participate in the dispute resolution process:

> It [inclusion of the children in the negotiation process] can put a lot of pressure [on the child] and should only be used where you are sure it is not going to do more harm than good. I think the model where it is set up for the whole family can work ... I wouldn't use it in-court. There is not enough time. You put the child in a precarious situation and you don't have enough time to follow up to see what the effect was. (court-welfare officer)

Normally after seeing the children the court-welfare officer reported the children's views to the registrar and to the parents. The methods of doing this varied with the facts of the case and the preferences of the registrar:

> I would probably let the registrar know what the children are saying and then probably discuss with him what the next step would be - maybe telling the parent who will be disappointed (court-welfare officer)
>
> It can vary because some registrars will expect you to say what the children have said, others see it as confidential, some ask you what you think is appropriate. (court-welfare officer)
>
> I usually go and see the registrar first and talk to him out of courtesy among other things. He may say, "well I think you should say it here [in the appointment with the registrar, the lawyers, and the parents] so they will all hear it together." Alternatively he may say, "I think it would be a good idea if you talked to the parties." I may do that. I may even talk to the solicitors first to say, "This is what I've done. Do you want to discuss it with your clients first?" [before going back in with the registrar] - especially where it is something that is, perhaps a little painful. (court-welfare officer)

It was common practice, in all of Greater London's in-court mediation processes, for court-welfare officers to report children's comments to the registrar in private before the parents were invited back into the mediation room.[47] The children's

47 Presumably registrars who might subsequently have to decide the family's case in a judicial capacity would not be able to follow this practice: Re B (A Minor) (Irregularity: Effect on Order): 180.

views were then commonly used by the registrar and court-welfare officer to exert pressure on the parents, or one of them, to settle the dispute in accordance with the children's wishes. The problem with this approach is that the process begins to look more like arbitration or adjudication than mediation. At the end of this type of in-court mediation process, the parents might not proceed to court out of a sense of futility rather than because they genuinely agree. We shall discuss some of the advantages and dangers including children in mediation in this way in under the heading 'In-Court Mediation and the Judiciary' at the end of this section and in chapter 5. Generally we shall find that, while this approach appears to be highly effective in producing temporary settlements, the quality and long-term nature of these 'agreements' appear questionable. Because section 1(3)(a) of the Children Act (1989) will[48] impose a duty upon the courts to have regard to the ascertainable wishes and feelings of children, it is likely that courts will continue to use this type of settlement pressure.

There was a great deal of confusion among this unit's court-welfare officers, and indeed among all of Greater London's in-court mediators, about the applicability of confidentiality in mediation to comments made by the children. None of the Greater London's court-welfare mediators knew whether or not they could safely offer confidentiality to children and they reported considerable discomfort with this issue:

> I sometimes find it quite difficult getting confidential information from children and then being able to use it. I find that quite difficult. I don't know if others find that. I think quite often you wouldn't get that information if you saw them all together ... there is something there I am uneasy about. I can't put my finger on it, but from the child's point of view I don't think it is ideal...(cwo/conciliator).
>
> I had one [a difficult case] where a child swore me to secrecy and yet one couldn't solve the problem without breaching it in some shape or form. What I did was to advise the parties, their solicitors, and the registrar that I felt things should be left as they were for the time being without going into the reasons why - though I think everyone could read between the

48 The Children Act (1989) is to come into force October 14, 1991: M. D. A. Freeman, (1991): 344.

> lines. It is difficult because how do you deal with the problem and at the same time retain the child's trust?..(cwo/conciliator)

This service's in-court mediators reported the use different approaches with respect to confidentiality and children. Some officers said they would respect a request for confidentiality from a child, others said they would respect the request in some circumstances but not in others. Still others doubted they had the right to accede to a child's request for confidentiality. Some officers said that they got around the problem by rephrasing children's comments as their own opinion, for example: "It appears to me that Johny's needs can best be met by allowing him to stay with X", instead of: "Johnny has indicated that he wants to stay with X because..". The officers reported that some registrars expected them to share the comments of the children with them, while others expected the officers to treat the children's comments confidentially. Legislative or judicial guidance is needed.[49]

Theoretically no order could be granted following or during in-court mediation except on the consent of the parties. 'Consent of the parties', however, often meant temporary acquiesce, not full consensus:

> Some [registrars] change ... as they read the situation. One registrar was anything but conciliatory in apparent terms because after initial discussion ... he would say, "well it seems to me that we aren't getting anywhere" because of this and this and "It seems to me that this is what should happen and gave the order there and then and they will accept it because he read them correctly. They can't make the decision but it someone makes it for them, they are thankful. It was astute reading of the situation. (court-welfare officer/conciliator)

Many in-court mediation 'agreements', not just those emanating from this court, are not truly consensual.[50]

After the court-welfare officer discussed the dispute with the parents and interviewed the children the meeting before the registrar reconvened with the parents,

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49 The issue of confidentiality for children in mediation is discussed in more depth in chapter 13.

50 For a discussion some of the in-court mediation pressures exerted by registrars observed during the course of this study, see 'In-Court Mediation and the Judiciary' at the end of this section of. See also: the Newcastle Report (1989); G. Davis (1988) (1989); G. Davis and K. Bader (1983a,b) (1985); G. Davis, A. MacLeod and M Murch (1982).

the lawyers and court-welfare officer in attendance. The views of the children were usually discussed and any 'agreements' arising were immediately turned into court orders. If the parties were uncertain an interim order might be granted and another in-court mediation appointment scheduled to review the situation. If no agreement could be reached, the appointment turned into a directions appointment and the registrar gave directions for the filing of affidavit evidence, ordered any necessary court-welfare reports, and or scheduled the matter for trial.

It is clear, from the comments of Central London's court-welfare officers, that most families appearing for in-court mediation at the Central Divorce Registry were being offered a hurried, pressure laden, at the doors of the court, type of settlement process. In the limited time available to them, these officers could not, no matter how skilled they were as mediators, do more. They did not have time to help parents create their own agreements through the integration of mutual interests and needs. They did not have time to effect changes in families' communication and negotiation patterns. Nor did they have time to help the disputants isolate their underlying interests and needs. Instead the focus was on court solutions, on trying to get the disputants to accept the court's views of the most appropriate resolutions. Is this process really mediation or is it 'at the doors of the court' settlement seeking? The parameters of this in-court mediation model left the officers of this unit little room to manoeuvre.

This court-welfare unit handled more 'mediation' cases than any other mediation service in Greater London. The court-welfare service's records indicate that 890 in-court mediation appointments were held at the Principal Registry during 1986, down from 1122 in 1985, 1020 in 1984, and 968 in 1983. Several of the officers offered a tentative explanation for the decreasing number of appointments. They suggested that placing mediation in the courts, as a normal part of the adversarial process, changes the way family lawyers work, making them much more likely to settle resolvable cases,

leaving only the most difficult cases to in-court mediation lists.[51] In tentative support of this argument, the chief court-welfare officer noted that the percentage of court-welfare reports ordered at the end of the in-court mediation appointments had been rising steadily since 1983: from 17% of the cases in 1983, 20 to 21% in 1984-1985, to 24% in 1986.[52] This phenomenon of decreasing agreement rates and the increasing difficulty of in-court mediation cases was also mentioned spontaneously by court-welfare officers working in other mediation services. A similar phenomenon has been observed in the United States.[53] This requires further investigation.

If a court-welfare report was ordered at the end of the Divorce Registry's in-court 'mediation' appointments, the report was not completed by the in-court mediator, but by a different officer. This unit maintained strict boundaries between mediation and investigation. Officers preparing welfare reports did not review mediation files on the same family. The style of welfare investigation conducted by this service was that preferred by the courts: [[54]]

> You see their [other officers who combine mediation and report writing] way of working is that they ask people to come into their offices whereas we go out and see the people in their home and I find seeing people in their home tells you an awful lot and these courts here expect you to have carried out a home visit. I've got one case I've got to redo because the court-welfare officers outside [the unit] did not do a home visit. (court-welfare officer)
>
> The important thing is that the court has the information it needs to adjudicate on if it needs to. I run across useless reports where they say, "We met with the parties three times and met with the children once, they couldn't agree on anything and these are the matters in dispute." The judge will throw these out. So the court will direct that they be done here ... If in the course of a report the issues are resolved, then no-one is going to be happier than the courts and often by setting out quite starkly the situation that can often help the parties to see the thing from both points of view. So I don't see the investigative report as necessarily being unconciliatory. The judges and solicitors are unhappy

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51 These figures were given to me by the service's chief officer reading from the agency's records. For further discussion of this issue, see Chapter 9.

52 Central court-welfare service internal records as read to me by the chief court-welfare officer.

53 I. Ricci, 'Legal Agreements (1989): 49.

54 Re H (Conciliation: Welfare Reports) [1986] 1 FLR 476; Merriman v Hardy, headnote, Justice of the Peace Vol. 151, No. 33, 526.

> with the conciliatory form of report ... We see ourselves as officers of the court whereas [certain other court welfare officers] would describe their role rather differently (court-welfare officer)

but not by the upper echelons of the probation service.[55] For example, the National Association of Probation Officer's policy document on Conciliation (1984) states:

> The general trend has been away from the investigative approach ... The parties can collect and present evidence for themselves and it is inappropriate for a welfare officer to do this for them.[56]

Similarly the Inner London Probation Service's *Review of Civil Work* (the Inner London Report)[57] endorsed the Family Courts' Service's (Service #16) therapeutic way of working and not that of this court-welfare unit.[58] The report recommended that new premises be found for all of Inner London's court-welfare officers which would allow the installation of therapeutic paraphernalia, which would: "bear in mind the need for facilities for video recording and for comfortable interviewing of children and whole families".[59] The report further recommended splitting the Central London Court-welfare unit in two and the creation of four specialized court-welfare units in Inner London which would take their identities "from the Boroughs they cover rather than from the courts they serve."[60]

When I contacted the Central London court-welfare service again in the summer of 1988, they were uneasy and in a state of change. The unit was still conducting in-court mediation as they had in 1987 but the unit had only retained seven officers, including its chief officer. The unit was under increasing internal pressure to abandon its investigative court-welfare methods in favour of therapeutic ones.

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55 See: NAPO, Policy (1984): 1; Gray, Hancock and Hutchings, Inner London (1987): 15, 20-21.

56 NAPO (1984): 1.

57 R. Gray et. al., Inner London (1987).

58 Ibid.: 15.

59 Ibid.: 21. It is unlikely that video cameras are advisable. See: D. Howe (1989). See also Chapter 6.

60. Ibid.: 20.

Service #3: the Mediation Services of the Highgate Divorce Unit[61]

The Highgate Divorce Unit was part of the Middlesex Court Welfare Service. An overview of the Middlesex service is provided in the description of service #1. In 1987 the Highgate Divorce Unit (Highgate) was responsible for court-welfare enquiries about children living in the Enfield, Harringay and Barnet Boroughs of London. The service employed a senior court-welfare officer, three full-time and two part-time court-welfare officers. Like Acton and Uxbridge, all full-time officers did only family work but shared office space with the probation service. Also like Acton and Uxbridge, this service provided officers to the court for section 41 hearings and so provided some limited, on the spot mediation then:

> The officers go on a different day to sit in on section 41 appointments ... Most judges ask some sort of questions and some are quick to ask for a court-welfare report. Others tell the parents to go out and sort it out themselves. Some judges use the court-welfare officer on the spot [for limited mediation], others tend to use the court-welfare report. (court-welfare officer)[62]

Most of the mediation provided by this unit, however, was conducted on the court premises during scheduled in-court mediation appointments.

Highgate actively promoted the use of out-of-court mediation services and to that end the officers carried leaflets and other information about mediation services offered by other agencies. The service accepted no clients directly or from solicitors. Highgate worked only with clients who came to the service from the courts. The service reported serving clients form a variety of ethnic and cultural backgrounds:

> We have a lot of Indian and Asian families breaking up and they have a more extended family involved with the children so it doesn't always

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61 The following information was derived from in-depth interviews with the four full-time court-welfare officers working in this unit (one of whom subsequently moved to Uxbridge); several attendances at the court-welfare unit's offices; attendances at Barnet and Edmonton County Courts for sixteen in-court mediation cases; and informal interviews with three registrars. The service was contacted again in the summer of 1988 to update agency information.

62. Sometimes judges themselves conducted a form of mediation or dispute resolution process during section 41 appointments. For example, one court-welfare officer commented: "I was on duty last week for section 41 hearings and the judge, from the bench, did the conciliation: allowed the arguments, he proceeded to do it himself." See also footnotes 27 and 44. We need research on the settlement activities of the judiciary in England.

> follow that you are only seeing the parents and the children. Maybe you have to see the grandmothers and [mother's] brothers as well if they are running the household.[63]

The service mediated disputes and conflicts about children. Like Acton, Uxbridge, Central London, this service did not mediate property and financial matters. Also like Acton, Uxbridge, and Central London this unit offered dispute resolution rather than therapy:

> [*What do you see as your role in conciliation?*] To enable the parents to come to an agreement. Sometimes they don't agree entirely but one of them will agree to step back and let an option go through. So agreements are not always 100% what each parent wants. In good mediation, they both give something. (court-welfare officer)

> The primary goal, [of mediation] from my point of view, is to enable the parents to reach agreement concerning their children rather than having that process being taken away from them and put in the hands of the court-welfare officer or the court. I regard conciliation, pure conciliation, as not about deciding what is best for the children on my part at all. I see it as a process of negotiation between the parents which I am facilitating. (court-welfare officer)

The Highgate office provided mediation services to the Barnet and Edmonton County Courts. Both of these courts had instituted formal in-court mediation processes, which shall now be described.

Formal in-court mediation at Barnet County Court started gradually. In 1987 scheduled mediation appointments were of recent origin:

> As far as Barnet, when I started two years ago, they didn't do it [in-court-mediation] ... Gradually he [the registrar] has started. Initially we were called to Barnet about once every three months. They would phone up and say, "Can somebody come to do it?". Now they are giving it set days, . . nothing as frequent as Edmonton but the principle is there and they are catching up. (court-welfare officer)

The Barnet County Court was located on the sixth floor of a large office building. The building contained a variety of other offices and businesses. The waiting area for the court was small, pleasant, more what one would expect of a professional office than of a court. All contested custody, access and care and control cases were

63. Extended family members did not usually attend in-court mediation before the registrar. They were more likely to attend the private in-court mediation sessions with the court-welfare officer or any mediation sessions held in court-welfare offices.

listed for mediation. In this court disputes arising during section 41 appointments were not normally referred into the mediation list.

The registrar of the court noted that the court did not have a high demand for mediation because very few custody or access cases were being contested. Consequently mediation cases were normally scheduled monthly in accordance with demand for the service. On the day I attended this court's in-court mediation sessions, four cases were scheduled at hourly intervals. The registrar did other work and handled non-mediation cases between mediation sessions. Two court-welfare officers were on duty and they worked with the families singly so each officer had approximately two hours to work with each family.

The arrangements for mediation made by this registrar were similar to the arrangements made by the other registrars in the other courts: no affidavits were supposed to be filed until the in-court mediation session was over; the disputants with their legal advisors, a court-welfare officer and the registrar were all in attendance for the first part of the meeting; the preliminary discussions before the registrar were primarily to set the scene and to give court endorsement to the process; and the desks in the room the registrar used for conciliation were arranged in a 'T' pattern with the disputants with their legal advisors sitting down each side of the 'T'.

Barnet County Court had only one full-time registrar (assisted by others working on a part-time basis.) The registrar, therefore, tried to steer clear of any discussions concerning contentious issues for fear he would later have to decide the case, or part of it, in a judicial capacity. Thus the registrar's participation was limited to the isolation of matters in contention and to giving court approval to settlement discussions. After the issues were isolated and the registrar had set the scene for mediation, the court-welfare officer was introduced and the disputants were invited to speak to him or her to see if anything could be worked out.

The disputants then went with the court-welfare officer down a corridor and across the waiting room into the interview room. I attended four of these private mediation sessions with two of the court-welfare officers and the disputants. The interview room contained only a long table with chairs. It was private and unintimidated. All court-welfare officers in this unit (which served both this and the Edmonton County Court) normally conducted mediation with the disputants together:

> We have them in together - unless they absolutely refuse to be in the same room together and sometimes even then you can get them together, by running between them, by the end of the session. But that is rare. I usually insist, use my authority and say: "This is a conciliation session and you are going to sit in the same room." (court-welfare officer)

The private mediation sessions observed in this court took the form of a round table discussion. The disputants were each given time to raise the matters which concerned them and they were encouraged to speak to one another. The officers kept the disputants focussed on making arrangements for the children. On occasion the officer suggest a possible solution for discussion. The disputants were not being pushed into making agreements, however, nor were they being pressured to accept any particular resolution (although in spite of the officers' best efforts, the disputants may have felt themselves to have been pressured).

It was clear however, that some of the disputants needed more time to work out the details of their agreements. In several cases, not only in this court but also in the other courts, it did appear that the disputants were seeking help with the details or particulars of the arrangements for their children and that the court (welfare officer and registrar) preferred to mask the dispute with a 'reasonable access' provision.[64] Although the provision was effective (at least temporarily) in getting the disputants through the court process, the provision did little to address the issues which concerned the parents.

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64 For discussion of the generality of the mediated agreements in the out-of-court services, see Service #14.

We know that very few parents litigate child arrangements.[65] It is doubtful these few parents would be before the courts at all if they were able to be reasonable about access.

When children were brought to this court for mediation sessions, they did not attend the first part of the appointment with the registrar. They were seen separately, apart from their parents, by the court-welfare officer. After these meetings, the children's' comments or concerns were usually relayed by the officer to the parents. Sometimes the officer sat with the child(ren) while the child told the parents, or one of them, of his or her concerns or preferences.

> One of the useful things I've found, where the mother says, "Oh I don't mind the children having access. I think they should see their dad but the children have said emphatically that they don't want to see him", ... we say, "Maybe it would be a good thing to have the children come in" and we say to dad, "Maybe you have to hear it from the children: we don't want to see dad." It may be very painful but they don't usually say that at all . . . (court-welfare officer)

The mediators reported that sometimes these meetings were painful[66] but that in other cases they produced dramatic and positive results:

> What you are looking for - like the mother says, "My children are terrified of him" and you have a meeting and then see the baby climbing all over him, pulling his earring and that is the end of the line. (court-welfare officer)

Legal representatives waited outside in the waiting room while the disputants and the children spoke privately with the court-welfare officer in the interview room.[67] Normally the court-welfare officers told the lawyers of the results of the private session (for example: "there was no agreement and a court-welfare report will be needed, the disputants have reached an agreement in 'XY' terms, there is an agreement on 'X' but not on 'Y', the disputants have agreed to try access visits for a three month period to see if the arrangements were workable") at the end of the private meeting. The officers

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65 See footnote 98 below.

66 For an example, see Chapter 5.

67 I did attend one private mediation session which ended with the court-welfare officer, the disputants and the legal advisors all participating in the private mediation process, after one of the lawyers had raised certain objections, but this was unusual.

did not usually discuss what was said by the disputants (with the exception sometimes of comments made by the children) with the disputants' lawyers.

After the lawyers were told of the outcome of the mediation session, everyone (except the children) re-attended before the registrar. Discussions at this point were limited to the amount of progress made in the case and to the terms of any agreements. This registrar tried not to become involved in the discussion of any disputes remaining for fear that he might later have to make a judicial decision.[68] He then turned any agreements into court consent orders, adjourned the case to enable the disputants to try time-limited arrangements or to allow further mediation sessions, or if no agreement could be reached, gave procedural directions for trial.

We turn now to a description of the mediation services in Edmonton County Court as they existed in 1987. No contested custody and access cases could be scheduled for trial at this court without the parents first being invited to attend the courts' in-court mediation process, unless the disputants' solicitors certified to the court that the case was impossible to settle. The court reported serving a mixed racial/ethnic population. Many of its' disputants were West Indian, Greek, or Indian.

Mediation cases were scheduled in the Edmonton County Court on Wednesdays starting at 10 o'clock in the morning. Mediation was usually be over by one or two o'clock in the afternoon. The attendance of the disputants was said to be voluntary because no proceedings were taken against disputants who failed to appear for mediation in accordance with the court's notice of appointment. It is doubtful that the disputants understood their attendance to be voluntary in these circumstance.[69] This court's notice of appointment asked the solicitors not to file affidavits until after the

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68. The registrar mentioned that he also conducted mediation in another court (outside of the study area) which had more registrars. He said this allowed him to be more active in the mediation process.

69 It is doubtful that the disputants felt their participation to be voluntary in these circumstances. See the comments made by disputants in the Newcastle Report (1989): 286-297.

mediation session. By October of 1987 solicitors were being asked to not file affidavit evidence until after any court-welfare reports had also been completed.

A maximum of six cases were listed for mediation and two court-welfare officers were available to assist the registrar. Like their Uxbridge colleagues, the officers in this unit worked separately. One officer could work with one family while the other was sitting with the registrar or working with another. Two cases per hour were scheduled before the registrar. Other cases such as applications to withdraw petitions, applications for substituted service, applications for consent orders on financial issues, were handled by the registrars between the mediation sessions.

In March of 1987, the mediation facilities in this court left much to be desired. The floors of the waiting area were bare cement, the walls were decorated only by a list of the court cases to be heard, the waiting room contained very few places for disputants to sit. Not all of the people in the waiting room were scheduled for mediation, some were scheduled for trial or hearings before the judge or another registrar. By the time mediation sessions started there was standing room only. Lawyers were calling out names in an effort to locate clients and witnesses. Immediately before the mediation sessions were scheduled to start (at ten o'clock) the usher called out a list of names of people scheduled for mediation and everyone lined up. It appeared that all of the disputants were scheduled to appear at the same time. The impression was one of chaos, confusion and fear.[70]

When I returned to the court in October of 1987, the mediation facilities had changed (although the rest of the court building appeared to be in the same state). New rooms had been created in a different part of the building. The new premises included a new central waiting area lit by skylights, and contained many chairs and magazines. Doors led from the central waiting area to the registrars' mediation rooms, to a robing

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70 I discovered later that part of the reason for this problem was that the interior of the court building was being refurbished.

room, a Bailiff's office, and to three interview rooms, two of which were reserved for the private mediation interviews. The court was creating three new sound proof mediation rooms for the court-welfare officers upstairs in the building, away from the registrars' offices. For some reason, perhaps because the premises were very new, the disputants were continuing to use the old central waiting area.

With few exceptions, the mediation process before the registrars in this court did not differ dramatically from the processes before the registrars in the other courts, previously described. One of these registrars invited the disputants rather than the lawyers to sit next to him during mediation appointments and the other did not sit behind the head desk but off to one side, nearer the disputants and their lawyers. Both practises added informality to the process. These registrars stressed the confidential nature of mediation discussions. The court-welfare officers who worked with these registrars said that the registrars were careful to offer disputants as much time as necessary to discuss issues in contention:

> (This quote is taken from an interview with two court-welfare officers. A change in speaker is identified by a change in letter) [*How much time do you have with the parties?*] A: As long as you like. You can carry on to the next day if you want to, practically that is a problem, but the registrar,- I always shiver when he says it - says: "You've got all the time in the world." B: You are encouraged, if you want to, to adjourn it. It is called adjourned in-court-conciliation. [You might use it] if you think there is any virtue in seeing the children in your office instead of in court, for something like that. There is no pressure on us from both courts [Barnet and Edmonton] to resolve it that day. If I go to [the registrar] and say I want another week because I want to see the children in my office. He'll say fine. They both emphasize that. (two court-welfare officers)

While the Highgate officers sometimes held 'adjourned in-court mediation' sessions at their offices, away from the courts, most of the unit's mediation was still being conducted on court premises. One officer estimated that only about one eighth of the unit's mediation cases included at least one session away from court premises. The frequency of this practice did appear, however, to be growing.

Edmonton County Court's registrars operated as a team. Any mediation cases involving disputants who had been seen by one of the registrars in a judicial capacity were passed to the other registrar for the appointment, even though the other registrar would not normally be doing mediation on that day. Similarly those attending mediation in this court were not scheduled for a hearing before the mediating registrar. Court-welfare officers involved with a family during mediation sessions did not subsequently conduct a court-welfare investigation on the same family.

The mediation notice emanating from this court specified that children over eleven should be brought and younger siblings could be brought to the court for mediation at the parents' discretion. If they came, children were not normally seen by the registrars, but privately by a court-welfare officer. The attendance of children was not enforced, however. The court expressed some concern about interviewing children on court premises. Highgate's court-welfare officers were under the impression that children did not usually come to this court for mediation sessions:

> Invariably they are not brought because parents don't like bringing children to court. It is very rare we get children in court. It happens occasionally ... It is a very bad setting. They have to wait in the court building. There are loads of people and cases being called. . If you weren't anxious when you came, you'd be anxious after waiting there. (court-welfare officer)[71]

When the children did come to court, they were usually seen separately from their parents. Whether or not they would be seen separately from each other depended on the circumstances:

> I would see the parents together and would certainly see the children separately. Now if you mean separating the children up, I would ask the kids to help me with that. I call them all in and say, "Do you know why you are here?", explain who I am. If I thought there were great potential differences between them, for example, if there was a five year age difference, I would ask "Would you mind chatting individually?". Some of them hang onto each other and say, "No. No". If it seems appropriate,

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71 Several of this unit's officers commented that children did not usually come to mediation sessions in this court. I must have attended mediation sessions on unusual days. Of the twelve cases I observed, six involved the court-welfare officer speaking to the child or children in attendance.

> if their needs are different, then I would see them separately as well. (court-welfare officer)

After the officers interviewed the children, the parents were informed the of the children's' comments, either by the court-welfare officer or by the child(ren) in the presence of the court-welfare officer. The children's comments or concerns were also usually relayed by the court-welfare officer to the registrar before the parties reconvened, with their solicitors, for the final part of the in-court mediation process. If there was still no agreement at that point, the registrars occasionally raised children's concerns in a final effort to effect settlement.[72]

If 'agreement' was reached in the process, the registrar granted a consent order immediately on the terms agreed. If not, mediation might be adjourned to another in-court date to enable the parents to try an arrangement on a trial basis; the matter might be adjourned to allow the disputants to have more mediation sessions off court premises at the court-welfare officers' offices; a consent order might be granted on some matters and a court-welfare investigation ordered to investigate other issues; a court-welfare investigation might be ordered and directions given for trial; or the matter might simply be listed for trial if a welfare investigation was not likely to be of assistance.

The court-welfare officers serving this unit estimated that between 49 and 50% of families mediating their disputes at Edmonton and Barnet County Courts were reaching complete agreement during the process, and that another 25 to 30% were reaching partial agreement. The Courts' registrars were not certain that cases settled in in-court mediation would not have been settled without the process, but they did think that the in-court mediation process had been effective in reducing the number of court-welfare reports needed.

Sometimes section 41 appointments gave rise to on-the-spot mediation. By the end of 1987 an increasing number of disputes arising during section 41 appointments

72 For further discussion of the probable effects of the use of children's comments in this manner, see: service #2, the section entitled 'In-Court Mediation and the Judiciary' at the end of this Section, and Chapters 3 and 5.

were being adjourned to enable the parents to attend court-welfare offices, away from the courts, for 'adjourned-in-court' mediation. As some of the in-court mediation cases were also being adjourned for continuing mediation at court-welfare offices, we turn now to a description of the premises used by this court-welfare service off court premises for their adjourned in-court mediation meetings.

Like the other court-welfare officers in Middlesex, these court-welfare officers shared offices with their probation colleagues. The brick building housing both services was located next to a police station. As one entered the hallway inside the building, there was a little window of approximately twelve by twelve inches with a bell to push for enquiries. On each of the four occasions I visited this office to conduct interviews, the reception was brusque and inhospitable. After being asked for my name and who I was to see, I was directed to the only waiting room.

The waiting room was located across the hall from the reception area. It was completely enclosed. Those waiting for appointments and those entering and leaving this room were not visible to any of the probation service's staff. The room was the only waiting area in the building and was being used for both criminal and family-law clients. The room contained an ashtray, some chairs which were badly needed repair and some posters on racism and alcoholism. There were no toys or other facilities for children. Highgate Divorce Unit staff said they received no notice from probation about the scheduling of criminal clients. They had no way of knowing if people who had been convicted of crimes against children were on the premises. This combined with the lack of supervision of the waiting area caused the officers to be very concerned about the safety of children and their families.

After leaving the waiting room, to get to the court-welfare officers' offices, it was necessary to go up stairs and through several sets of doors secured by prominently displayed security locks. This increased the criminal atmosphere of the premises. Once the court-welfare officers' offices were reached, however, the atmosphere changed. The

officers had done what they could to make their own offices pleasant for families and children. Adjourned in-court mediation sessions (and family sessions held during the course of the court-welfare investigations) were conducted in the officers' personal offices. These were filled with children's' toys and information for parents about separation and divorce.

The offices were not soundproof, however, and the officers complained of the lack of facilities for supervising children when it was necessary to separate them from their parents during mediation sessions. Discussions occurring in the offices could be heard in the hallways. This, and the fact that the hallways were shared with the probation service made the hallways unsuitable for children.

Surely families and children whose parents are going through separation and divorce, should not be thrown in with convicted criminals and left to their own devices. One hopes that this service has now been provided with premises suitable to family law clients. The Highgate Divorce Unit still occupied the offices described here in the summer of 1988.

When mediation sessions were held at the court-welfare service's offices, these were often conducted by two officers - if possible, a male and a female pair. The families were given time to discuss the matters which concerned them:

> When we get an adjournment we have the family in the office and work for several hours. I have a colleague join me and we do it what I call properly ... I have the whole family in together to explain [the process]. Then [we] see each parent separately then see the children separately or together. I normally allow the family to make that decision. It is their session ... You take your time and do it properly. (court-welfare officer/conciliator)

Conducting the mediation sessions away from the court allowed the officers more flexibility:

> The in-court model is not my idea of the best way to do conciliation because I think there is pressure and I like working with a co-worker and I like having people inside and outside [the conciliation session] at various stages ... We invariably see people together in-court. There isn't the

> time and space to have the flexibility I used to have with out-of-court [mediation]. It is a different process. (court-welfare officer)

Agreements reached by the parents during adjourned in-court mediation were reduced to writing if the parents thought it necessary or if they wanted to obtain a court order:

> If they now have enough trust they don't need a court order anymore, so be it. If they feel they want what has been happening put into a consent order, then I draw up a letter with the parties for each solicitor [saying] 'the parties want this drawn up into a consent order, please do it.' (court-welfare officer)

If allegations of child abuse were made during mediation and seriously maintained, this service terminated mediation, encouraged the alleging parent to report the allegation or, if the process was being conducted on the court premises, sought a court-welfare report. With the exception of child abuse allegations, this service maintained confidentiality of the mediation sessions:

> We keep brief records of who has conciliated with whom and then that person cannot do the court-welfare report. Because we say to people at the beginning of the conciliation session, that it is confidential, it is privileged and "you can say what you like, it is not going to be reported - except if you agree - then we will say what you agree but . . anything that goes on inside won't go outside unless you want it to. (court-welfare officer)

Court reports were prepared by different officers.

This unit's officers encouraged parents to reach agreement during court welfare enquiries. To that end, the officers often held family meetings during the enquiry process but, as we have already seen,[73] they were careful to distinguish the two processes. If agreements were reached during court-welfare investigations, the final court report recited the terms of the agreement, together with discussion of some of the surrounding circumstances:

> If after a family meeting, they come to an agreement, then we would just report that they had come to a family meeting and that they had a long discussion and this was the problem. They both acknowledged that Billy is doing well in school, this was the problem and here is what they

73 An overview of the three Middlesex services is provided at the beginning of the description of Service #1.

> propose to do about it. Then we would limit our report to that. The only time it goes wrong is if sometime between the time you've seen them at the office and the time it goes back to court something has blown up. For example, the mother suddenly comes up with an allegation of abuse. Then, of course, we've got to investigate that. (court-welfare officer)

When I contacted this service again in the summer of 1988, they reported that nothing of significance had changed in the way they were working except that one officer had left to join one of the other Middlesex court-welfare units and that a new officer had been hired for the unit.

Service #4: the Family Courts Service on Richmond Road in Kingston[74]

The Family Courts Service on Richmond Road in Kingston (the Richmond service) provided in-court mediation in South-West London to the Kingston County Court . In-court mediation had become a normal part of the Kingston County Court's 'adversarial' processes in August of 1984. The Richmond service did not usually accept self referrals or referrals from solicitors for voluntary mediation. With rare exceptions, all of Richmond's clients came to the service from the courts. Non court disputants seeking mediation were referred to Mediation In Divorce (service #14). Richmond provided most of its' mediation on court premises between scheduled in-court mediation appointments. Mediation sessions were also sometimes held at Richmond's office, away from court premises, when in-court mediation sessions were adjourned for that purpose:

> [*Do you do any out-of-court mediation?*] Sometimes, after an adjournment from in-court. We only do out-of-court settlement seeking if a case is voluntarily adjourned for [more sessions]. . . Then it is 'in-court conciliation out of court'. (court welfare officer)

In 1987 and 1988 this service employed one senior and five other court-welfare officers. Two of the officers were male, the others female. All of the officers had over eight years of experience as court-welfare or probation officers and many had

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74 The information which follows was taken from in-depth interviews with the senior and five court-welfare officers working in this office in 1987; attendances at the court-welfare offices; informal interviews with the registrar and court staff at Kingston County Court and attendance at the court for four mediation sessions. For an interesting, earlier study of this service, see: C. Clulow and C. Vincent (1987).

taken, or where in the process of taking, three-year part-time family therapy courses. None of the officers did any criminal work.

Most court-welfare officers in Greater London said their primary function and role in mediation was to assist separating and divorcing parents to accept responsibility for their own children.[75] These officers were no exception:

> [The goal of mediation is] to help them to be joint parents of the children. These are the only parents these children are going to have for the future. . . to have two parents even though they are not living together. I believe in that. (court-welfare officer)

> [The goal of mediation is] to help people learn that they can continue to be parents even when they are not married to one another and learning to negotiate and compromise. (court-welfare officer)

The members of this service concentrated on disputes between the parents about children:

> Our's [mediation service] is restricted to the children: where are they going to live, what schools they will attend, how often they will see the other parent. We don't get involved in property or finance. (court-welfare officer)

Financial and property issues, if they were discussed at all, were discussed in general terms if these issues were entwined with the child issues:

> [*Do you include financial and property matters?*] Sometimes it might be helpful to discuss it: if, for example, an inventive arrangement about the house might help solve the child issues but never in detail. I would leave that to the solicitors. We would always discuss it if it was raised but would always refer back to their solicitors for the details. The legal details are very complicated and so we are very fraught to enter that field. (court-welfare officer)

Richmond did not mediate financial and property issues. Most of Richmond's mediation cases involved disputes over access.

In 1987 two officers from this unit went to Kingston County Court every second Wednesday to help one registrar with in-court mediation. A maximum of four cases were listed. Mediation cases were expected to take about an hour each. Families were all scheduled to appear at the same time:

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75 See chapters 3 and 5. See also: Newcastle Report (1989): 110.

> Now it has gone a bit haywire and they all tend to turn up together, which is unfortunate. The problem before was that if the two [scheduled] at 10:30 didn't turn up, everyone was sitting around for an hour doing nothing so now I think the registrar has probably decided to invite them all in at the same time. (court-welfare officer)[76]

Scheduling was seen to be a problem by many of the courts in Greater London, not just by this one. When disputants, or one of them, did not appear for the first set of in-court mediation appointments, court-welfare officers in Greater London's courts were being left with nothing to do until the next set of families appeared. Given the difficulties the courts were having obtaining court-welfare reports promptly,[77] this was an important consideration for the courts. (The registrars in most of the County Courts scheduled other proceedings and paper work between mediation appointments, so registrar time appeared to be relatively unaffected.) Consequently, in an effort to make the service more cost effective, some courts in Greater London reduced the time between appointments, and others scheduled all disputants to appear at the same time. If one considers only some of the costs to the state and the convenience of court personnel, this appears commendable, but what about the costs to these families and their children? What about the emotional, psychological costs; the costs of having idle lawyers waiting in court lobbies; the costs to the disputants of taking time from work; the costs to the children of long waits in tense, hostile environments? Was the small saving of court-welfare time worth these other costs? Should the courts not have some responsibility to the public they serve?[78]

The court-welfare officers and the Court's registrar had the impression that, while the parents appearing for mediation appointments in this court had varied socioeconomic backgrounds, they were predominantly semi-professional and middle

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76 Kingston County Court's registrar confirmed the new scheduling arrangements. Earlier two families had been scheduled to appear at 10:30 in the morning and another two at 11:30.

77 *Elder v Elder* [1986] 1 FLR 610, (Nov. 25, 1985, Court of Appeal), and the comments of Sir John Arnold as quoted on p.614; and *Scott v Scott* [1986] 2 FLR 320 (March 25, 1986, Court of Appeal) at p. 322.

78 These comments are intended to apply to court scheduling in general, not to this court in particular. In fact, since this court scheduled only four mediation appointments per day, families in this court may have been better off than those in some of the other courts.

class. The Richmond Service reported not having many clients from varied cultural, racial, and ethnic backgrounds. In 1986 forty-six families attended in-court mediation in Kingston County Court and, between the first day of January and the first of July 1987, forty-four families attended.[79]

Kingston County Court referred all custody and access matters, (except those proceeding by agreement) and any applications for variation of arrangements concerning children, to the court's registrars who then went through the files and listed for mediation all cases the registrars thought might benefit from the in-court mediation process. Cases which had been of long standing in the courts were not listed, nor were cases listed when all of the solicitors involved indicated that mediation would be futile. One of the Court's registrars estimated that, on average, nine out of ten child dispute cases were being listed. Disputes arising during section 41 hearings were not normally sent to in-court mediation, except upon the request of the parents.

This court regularly sent letters to solicitors advising them of the services of Mediation In Divorce, a voluntary out-of-court mediation service in the area, (service #14) and of Kingston County Court's automatic in-court mediation process. All those listed for the in-court mediation were given notice, usually through their solicitors, to attend before the Court's registrar for a directions appointment. The notice asked the disputants' solicitors to postpone filling affidavits and asked the disputants to bring with them all of involved children aged five and older. This was the youngest age of child involvement in mediation of all the Greater London County Courts. As in the other courts, the disputants and their legal advisors were expected first to attend before the registrar to isolate issues in contention and to be receive the court's approval of the mediation process.

The preliminary proceedings before the registrar in this court were essentially the same as those before the registrars in the other courts except that this court held

79 Kingston County Court statistical records.

mediation appointments in the court room. This had the effect of separating the disputants from their legal advisors and from the registrar. As was to be expected, the registrar and the legal advisors did most of the talking during this part of the mediation appointment. After the registrar and the legal advisors isolated the areas of dispute, this registrar told the disputants that he did not expect any final orders to be made but that if the parties could come to an agreement, their own agreement would usually be a better solution than any the court would impose. No matter what the intent of the registrar, this type of statement can sound ominous to and exert pressure on disputants.[80] The court-welfare officer(s) in attendance were then introduced by the registrar and made available to the parties. This registrar, unlike those in other courts, did not tell the disputants to speak to the court-welfare officers but merely offered them the opportunity to do so. Despite this registrar's attempt to ensure that the process was voluntary in this way, it is doubtful that many disputants would have felt able to refuse the court's encouragement and offer of assistance.

The appointment was then adjourned to allow the family to have a private discussion with the welfare officers in one of the two private interview rooms. In this court, if fewer than four of the listed mediation cases needed the assistance of a court-welfare officer, the court-welfare officers conducted the private mediation sessions in pairs:

> If we have four appointments we may not be able to do them together. We may have to split up. But if only two show up, we might say how about if we both do this couple and then both do the other couple. (court-welfare officer)
>
> [*Do you work singly?*] Not always. I have, because it has just worked out that way. Colleagues of mine will often see the family together. When I have been there there have been four cases but when there are only two, the workers may decide to see each family together. (court-welfare officer)

80 Newcastle Report (1989): 292-298.

The officers usually had between three quarters and one hour alone with each family. This time was not being used to solicit court 'consent' orders but to explore, with the disputants, the options available to them:

> (A change in speaker is identified by a change in number.) #1: We also have some doubts about in-court agreements which may be reached rather swiftly and certainly under pressure, which may not then hold. We discovered very early on that using in-court conciliation to get an agreement was probably not a good idea: that it was better to use it as an assessment period - to asses their potential for negotiating with each other - to explore the areas of agreement and disagreement rather than pushing them into something saying "Right, now we have three-quarters of an hour to see what we can come up with. Here are your options." That change took some of the pressure off of us and it took pressure off them. So what we are really doing is exploring the potential for compromise. #2: Yes, it is put in the context of exploring the options rather than expecting them to reach agreement then and there. (two court-welfare officers)

> I would be more likely to say, "there is no need for a decision now" but to explore whether agreement may be possible because it is unreasonable to expect people to make decisions in that pressurized location, because whatever you say there is pressure. It is a court. (court-welfare officer)

When doing in-court mediation these officers tended to stay away from therapeutic interventions and to concentrate instead on the inter-disputant negotiations:

> You are thinking on your feet, assessing and diagnosing very fast - the potential for negotiation - and you really don't have time to address the hidden messages. That is what I am not prepared to do any longer. My traditional social-work training geared me to listening to what was happening underneath and addressing that and if you get stuck on that, you will never get anywhere . . you can say goodbye to the negotiation bit. (court-welfare officer).

While this court invited the parents to bring children of school age (5) and over, attendance was not enforced over the objections of both parents. When the children did come, they were not usually seen by the registrar but privately by the court-welfare officer(s) with their siblings, or with their parents, depending on the preferences of the court-welfare officer involved. During the private part of the in-court mediation sessions the these court-welfare officers almost invariably saw the parents together. Some started with the family as a whole:

> I tend to see the couple with the children if they are there, the whole family unless I get the feeling the tension level is such the children should be excluded. (court-welfare officer)

Others started with the parents and incorporated the children later;

> More recently I start by seeing the couple together first and incorporating the children when I am a bit more certain about what was going on. (court-welfare officer)

> I like them [the children] to be there but I would never start cold in a family meeting with them in the room until I've tested the water. I want a little control over the situation so I say to the children, "I'm going to talk to your parents and then maybe you can help us a little later." I wouldn't take them into a family meeting without their permission. I sometimes see them with the parents and then separately or sometimes see the parents then see the kids and then all together or sometimes one of us will see the parents, one the kids, and then come together. (court-welfare officer)

Officers also commonly saw children separately from their parents:

> I never split the parents. Quite often I see parents separately and then the children and then [have a] family meeting. (court-welfare officer)

> I tend to see the children in court separately, away from their parents to take them from the quick, pressurized, hot house atmosphere. (court-welfare officer)

After seeing the children, the officers usually met again with the parents either with or without the children. At that time the officer might report what the children were saying:

> Then I say to the children, "Do you mind if I tell your parents what you've said? This is very helpful and I think you've done a great deal to assist your parents." In most cases they want to come back in [to the meeting with their parents] in some cases not because maybe they haven't seen the other for some time. It is very difficult. . . We don't want to exacerbate tension, you are there to reduce it. So we would use our judgement as to whether the children actually came in [to the joint session with the parents]. (court-welfare officer)

> Like all of the other Greater London mediation services, this one also breached confidentiality in cases of apparent child abuse:

> Then I would say, "well, I'm sorry but this has got to be looked at independently. Or if there is any kind of . . an issue of children's safety, for example: "I'm concerned about his drinking and I'm worried about the child's safety" or if social services is involved, then you have to stop it and say, "Do you mind if we speak to social services? This has to be looked at further." (court-welfare officer)

After the private meetings with the officer(s) the parents usually spoke briefly with their legal advisors and then everyone, usually with the exception of the children, reconvened before the registrar to report on the outcome of the mediation session. At this point the registrar choose one of the following options: a court-welfare report if there appeared little likelihood of agreement or if the court-welfare officer had some concerns about a child's welfare; a court order on the consent of the parties; an informal agreement between the parties (the registrar reported that some parents did not want their 'agreements' recorded); adjourned in-court mediation at the court-welfare officers' offices; or another in-court mediation session to enable the parties to try an agreement on a trial basis:

> If during the discussion one is a little hesitant to totally concede, it may often be that they may like to try it out for a few weeks, in which case we would suggest that it be adjourned for two or three months. We will remain involved if the parties wish or they can go away and try it out for two or three months. (court-welfare officer)

When Kingston County Court's registrar granted a court order on consent, he was always careful to tell the parties that court orders concerning children were not final and that the parents were at liberty to reapply at a later date.

The court-welfare officers told me that, when mediation was first instituted in this court, the court's agreement rates were very high. Later, the rates dropped and the cases became more difficult. As we have seen, this phenomenon is not unique to this service. Individual officers from seven of the eight probation/court-welfare mediation services separately and spontaneously made similar statements. One of Richmond's officers offered a possible explanation:

> At one point it seemed to be going along reasonably well but now, my personal experience is that we are getting an awful lot of people who either they don't want to see us and they say, "no, we want to go before the judge for a full hearing", or once we get them in the room, they start shouting at each other to such an extent that it is impossible. Clients have either become very familiar with the system and they now know their way around it. . . The other possibility is that they are settling before they come to us - with the solicitors before we appear on the scene - and the solicitors who are now more conversant with . . the

> conciliation approach, not necessarily the process, are now doing something to get the clients to compromise. Probably that is the reason. If the solicitors can't do anything with them, we get the ones that are left. (court-welfare officer)

Kingston County Court's statistical records showed that of the 46 1986 cases, 21 were settled and 20 were scheduled for court-welfare enquiry and hearing. The other five were withdrawn or adjourned. Of the 44 cases seen between January 1st and the first day of July 1987, 12 were settled, 2 resulted in partial agreements, 18 were scheduled for court-welfare enquiry and hearing, and 12 were adjourned or withdrawn.[81] Presumably appointments were adjourned to enable families to try arrangements on a trial basis or to enable them to attend further mediation sessions at Richmond's offices. In addition to reflecting an increase in the difficulty of the mediation cases, the decrease in agreement rates may have reflected reduced court-welfare officer pressure on the disputants to agree.

Most of Richmond's mediation clients were seen at Kingston County Court during the scheduled mediation sessions already described. Some, however, were offered further mediation appointments at the Richmond's offices. The Richmond unit occupied a large, residential, three-storey house located in a mixed residential/business area, a short walk from Kingston's central business district. The premises were well suited to family work, being comfortable but unpretentious and unofficial. The room most commonly used for the unit's family work was spacious, bright and cheerful, and contained a large box of children's toys. A video camera was noticeable but was no longer used.

When conducting mediation sessions in their own offices, Richmond's officers used basically the same processes as they used in court. Some cases were handled by an officer working alone, and others by two workers. The officers of this unit had earlier

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81 Kingston County Court statistical records. The records did not distinguish between cases settled by the lawyers and those settled by the court-welfare officers during the private mediation appointments.

taken training in, and experimented with the use of Milan family-systems therapy methods in mediation.[82] This service had rejected the use of this approach:

> With Balham we did a week's course on Milan, a five day course with . . the Cardiff Institute. After that course they went into it wholesale and we put it in experimentally with some of our clients. They have carried on and we've stopped. (court-welfare officer)

> We were trying out a new model, the Milan method and when they have a split [between how the interviewer in the room with the family views the situation and how the team observing the session behind the two way mirror or on video camera views the situation] they [Milan practitioners] give the family a split team message. We had enough trouble with the basic stuff. We didn't just have one split, we had four splits and all we achieved was a mass state of confusion as to what was going on. It didn't really help. (court-welfare officer)

> [When we do a court-welfare report] we do not necessarily have the whole family in. We tried doing that initially. We did a lot of group monitoring with the one way video and to my way of thinking, we got nowhere fast. (court-welfare officer)

> [*Do you still use Milan?*] #1: I can't understand it myself. #2: We picked out the bits of Milan that a) we can use comfortably and b) that make sense. We don't use any one approach. . . We use lots of approaches really. (two court-welfare officers)

In addition to doing in-court mediation, this court-welfare unit conducted court-welfare enquiries for this and other courts whenever the children involved resided in the South-West region of Greater London. Richmond was very careful to separate its' welfare enquiries from its mediation services. Officers who had been involved with a family in mediation were not subsequently involved in the preparation of court-welfare reports and they were excluded from any collegial case discussions:

> It is very important to keep the roles separate. Otherwise you confuse the clients. In this office we are very careful to keep conciliation separate, even to the extent that in any letters we write we sign as conciliators rather than as court-welfare officers. . Also there is a ruling that conciliation is strictly confidential and the officer involved in conciliation is not involved in the court-welfare report and we take that a step further: the conciliator is excluded from any subsequent discussions about the case. (court-welfare officer)

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82 For a description of the use of these methods, see Service #16. For a discussion of the appropriateness of therapy in mediation, see chapter 6, and for a discussion of family-systems theory and its relevance to mediation, see chapter 12.

> I've moved now from my earlier thinking that you can combine what I understand as conciliation proper and report writing. So we do split those. If we have someone coming to voluntary conciliation from the courts and that fails and it goes on to a court-welfare report, it will be someone else and it is clear there will be no communication between the two. (court-welfare officer)

When this unit conducted court-welfare investigations, these were investigative but conducted in a conciliatory manner. Family meetings were commonly held to encourage the parents to communicate with each other and to try to get them reach some consensus about their children:

> We take a conciliatory approach in most cases, unless they have had some hefty conciliation before they have seen us. We would always have a view to a possible agreement or compromise but we wouldn't necessarily start off with conciliation if they had already experienced it. In that case we start off with a more investigative role and if the opportunity arises, we might go for it, in that sense you may still be conciliatory. . . We call it settlement seeking rather than a conciliation approach on purpose. (court-welfare officer)

> I would still use a family approach but as and when it is right. We combine that with investigative work. I spent many years trying to get the family in all together and then I decided it was better . . to get each parent in separately to start with so they could then get whatever it was off their minds - so they feel that their individual story had been heard and once you get some of that out of the way, then you can bring them back together to talk more sensibly about their children. (court-welfare officer)

In cases involving allegations about the welfare of children or in cases involving family violence, this unit abandoned settlement seeking and placed higher priority on investigation:

> If real welfare issues had already been identified we would not put a high profile on trying to reach parental agreements. (court-welfare officer)

> The ones which I would delete from inviting them both in to discuss the case options are the ones where serious allegations of abuse, physical or mental exist. Then we are under an obligation to do an investigative approach with information seeking and questioning which can't be seen as therapeutic even though one tries to do it in as genteel a way as possible. (court-welfare officer)

Richmond's court-welfare enquiries, particularly those which were purely investigative, were usually carried out by an officer working alone although there were exceptions:

> I don't have enough staff so we use hybrids with two workers being involved at different stages, not throughout the process, though we do do that as well with particular ones: where there has been violence against workers and so on. With others we may bring in a co-worker to assist if during the process you know you are going to have a complicated family meeting. (court-welfare officer)

The service thought it more important to have two workers conducting mediation sessions than they did to have two workers conducting court-welfare investigations.

When the parents reached agreement during the adjourned in-court mediation, the officers normally:

> Set out the agreement, send one [copy] to both parties and suggest they take it to their solicitors. (court-welfare officer)

When the parents reached agreement during the investigation process, the agreements normally formed the basis of the subsequent court-welfare report:

> We write a report to the court outlining the nature of the agreement with some statement about the dilemma and ask the court to ratify it. (court-welfare officer)

> We write the briefest, least inflammatory report we can endorsing the agreement. (court-welfare officer)

This completes our discussion of Greater London's in-court, conflict-resolution based mediation services.[83] We can detect considerable court-welfare officer dissatisfaction with at-the-doors-of-the-court pressurized settlement seeking, and a movement, on the part both of the courts and the court-welfare officers, to encourage slower-paced, less pressurized types of mediation. The in-court mediation pressures appeared to emanate from time constraints, and from pressures placed on the process by the judiciary. We look briefly at the latter problem in the next section.

In-Court Mediation and the Judiciary:

We have seen that, with the exception of a few of the registrars at the Divorce Registry (Service #2), Greater London's registrars usually limited their participation in the first

83 The in-court mediation appointments at Wandsworth County Court, at Ilford County Court, and at Bow County Court operated in basically the same ways as those described in this section. The latter processes are described in a different sections, however, (See Sections 3 and 4: services 15 and 16) because the court-welfare units serving these courts were using therapeutic methods.

stage of the in-court mediation process to the isolation of issues in contention and to giving the court's approval to settlement discussions. The registrars did not usually intentionally exert pressure on the disputants at this stage of the process. When we discuss services 15 and 16, we shall find that this was true also of the registrars working in the Wandsworth, Ilford, and Bow County Courts.

The registrars sometimes exerted pressure unintentionally, however. During the preliminary process, registrars commonly told disputants that any agreement they reached would be better than the one the court would impose, or said that if the disputants did not reach agreement, a court welfare report would be ordered which would "investigate all aspects of their case".[84] While it was undoubtedly helpful for the parties to know the alternatives available to them, these statements sounded ominous. Like the parents who participated in the *Newcastle Report* research, these parents must have felt that they would have to agree to avoid the court's displeasure and intense scrutiny.[85] The other potential problem at this stage in the proceedings was with respect to access to the courts. Many cases were listed for in-court mediation upon a father's application for access or for enforcement of access. Sometimes the mothers did not appear for the appointment. These fathers were being told by some registrars that the courts had no effective way of enforcing access, and that the only way access could work was with their wives' co-operation. These matters were then adjourned for further mediation or family sessions. How many 'mediation' appointments would these men attend before they gave up all hope of seeing their children? It is important to ensure that settlement seeking in the courts does not inadvertently result in denial of access to justice.[86]

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84 See also services 15 and 16.

85 See Newcastle Report.

86 See also: G. Davis and K. Bader (1985): 45. After a study of in-court mediation appointments in England the authors concluded, "In the absence of anything more constructive, conciliation in the court premises becomes synonymous with delay. As non lawyers we are struck by this reluctance to allow cases to proceed to trial."

When the registrars intentionally exerted settlement pressure on the disputants, this was most likely to occur after the private sessions with the court-welfare officer, when the disputants reconvened before the registrar to discuss the outcome of their discussions. As we have seen, the children's comments and concerns were regularly relayed by the mediating court-welfare officer to the registrar before the disputants returned. When the parents were unable to reach agreement, and when the children appeared to be siding with one parent's perspective, it was fairly common for the registrars to repeat children's comments or to otherwise exert pressure on one of the parents to accede to the children's wishes.[87] In these cases, the children's comments often determined the matter.[88] The pressure created by this practice was enormous. How many parents would wish to appear to be opposing their own children's wishes when confronted with them publicly in front of a member of the judiciary, a court official and two or more legal advisors?[89]

The court-welfare officers and the registrars involved in in-court mediation in Greater London commonly recited for me examples of registrar pressure:

> It is very tempting when you have these time limits and you are only that far from an agreement, to bulldoze people in and I've seen some registrars do it and I think, 'You are wasting your time - because as soon as they get out of the building, it's gone and a lot of people agree just to get out of the building...(court-welfare officer/conciliator)

> [The agreement] required a strong line. If you took the view that you were never going to exercise your authority but simply use your persuasive powers, you wouldn't have got a result without a contest in court and a long delay. But what you got was an arrangement which was in the best interests of the children and it was achieved in a month ... If you take the line that conciliation is each [parent] talking, there is no way

87 Sometimes the court-welfare mediators became child advocates. For further discussion, and for discussion of the place of child advocacy in mediation generally, see chapter 5.

88 See also: G. Davis and K. Bader (1983b): 357.

89 In addition to being highly directive, this practice is dangerous. There are many reasons children will side with one parent against the other, particularly in the midst of the crisis brought on by divorce. Sometimes these reasons have little or nothing to do with children's best interests or welfare: G. P. Davidson 13; M.D.A. Freeman (1983): 206, 214; J. Wallerstein and J. Kelly (1983); R. A. Warshak and J. Santrock (1983): 29. We know that the choices children make in the midst of the divorce process are not dependable: J. Wallerstein and J. Kelly; R. A. Warshak and J. Santrock above. The court-welfare officers did not have adequate time during the in-court mediation process to explore these matters.

> this man and this woman would have reached an agreement on their own, so someone had to persuade them that this was in the interests of the children. (registrar speaking of an in-court mediation session)

Other examples were observed. During one in-court mediation case, the registrar put forward several proposals to try to get around objections raised by each of the parents and then started to argue forcefully with the father, asking him to be generous. An argument ensued between the court-welfare officer and the father. Next the registrar said forcefully: "Look, this boy should be seeing his mother as the judge ordered, now what order should be made?"[90] The father's barrister immediately and equally forcefully responded "none", whereupon the registrar acknowledged that there had, in fact, been no agreement. No order was made. There is little doubt in my mind that this session would have resulted in a "consent" order had not a barrister been present to object.

There were other examples. In one 'mediation' case a the children allegedly said they did not wish to see one of the parents and the application for access appeared to be frivolous. (Access granted in the past had not been exercised.) The registrar refused to list the dispute for hearing, telling the parent that there was no way any court would grant access against the child's wishes. In another case, both parents consented to access and to its duration, but even after a lengthy session with a court welfare officer, could not agree on the time access was to start. The parents disagreed by one hour. The registrar had the solicitors in and directed them to go out to tell the parents that they had better reach an agreement, because if they didn't they faced loosing their legal aid certificates, and if the case came to a hearing the court would split the difference and would make sure that any order granted was inconvenient to them both. The solicitors did as they were requested and the matter was resolved. In a

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90 Throughout this study quotations and case observations have been changed with respect to minor particulars of the disputes or the disputants to ensure disputant confidentiality.

number of other cases, registrars attempted to encourage (pressure?91) one of the parents to allow access when this was in accordance with a child's wishes.

Not all of the registrars exerted pressure of this kind. Some of the registrars limited their participation in mediation to the preliminary process and to granting orders on consent, others were excellent non-directive mediators, themselves. The registrars who did exert pressure, did not do so in all cases. Nevertheless, in between one quarter and one-third (28.3%, 13/46)[92] of the in-court mediation cases observed, the registrar exerted pressure on the parents to settle and/or to agree to an order thought by the court to be in accordance with a child's wishes or interests. The practice was, therefore, not uncommon.[93]

All of the registrars, including those who exerted pressure in this manner, were acting in a manner calculated to protect the best interests of the children. While in some of these cases the registrars were being highly directive, and while the process resembled adjudication more than it did mediation,[94] all of the registrars were probably correct in their assessments of the best interests of the children involved. Given the fact that the protection of children's welfare is the raison d'etre for court involvement in family law,[95] the registrars' behaviour would appear to be entirely appropriate to the function of the courts. The courts must offer protection to children when their parents do not or cannot act in the children's best interests. The problem is that the adversarial

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91 Given the authority and status of registrars, encouragement will likely be experienced by most people as direction.

92 Fifty-five in-court mediation appointments were observed. I was present when the court-welfare officer and the disputants returned to discuss the outcome of the private discussion with the registrar in 46 of these cases.

93 See also: G. Davis and K. Bader (1985a): 42; a letter to the editor of the New Law Journal, Vol. 133 (Nov. 25, 1983), p.1046 written by the law firm of E. T. Ray & Co. protesting that their clients (8 at that time), had reported 'arm twisting' during the in-court mediation process. (While this is hardly a representative sample of cases, it does indicate that some participants are having problems with the process). See also The Newcastle Report (1989).

94 See also: G. Davis (1983b): 131.

95 S. Cretney (1984): 323-339, section 1, Children Act 1989.

process, with its investigation abilities, its procedural and evidentiary rules, is better suited to child protection that are settlement seeking and mediation.

Section 2: Greater London's Out-Of-Court Dispute-Resolution Mediation Services:

We turn now to the out-of-court dispute-resolution based mediation services operating in Greater London. As we move through the service descriptions, we shall want to compare the degree of disputant autonomy offered by the services operating independently of the courts with that offered by the services operating on court premises.

Service #5: Family Conciliation Bureau in Bromley[96]

The Family Conciliation Bureau in Bromley (hereafter called Bromley) began offering mediation to the public in July of 1979, making it one of the earliest of the formally established mediation services in England.[97] The service shared premises with the South-East London Court-Welfare Service (SELCWS) but was independent of the court-welfare unit. Bromley was a full member of the National Family Conciliation Council (NFCC).[98]

In 1987 SELCWS employed one senior and five full-time court-welfare officers. SELCWS also employed a full-time administrator who was responsible for overseeing all of the services affiliated to SELCWS. The members of the SELCWS participated in Bromley's mediation service; provided court-welfare services in the Bromley, Croyden and Bexley areas of Greater London; and provided services to the Bromley and Croyden County Courts and the Bexley, Bromley and Croyden Magistrates' Courts. In addition to the Bromley mediation service, SELCWS's office in Bromley also administered, as separate, but affiliated services, a divorce and separation counselling

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96 Except where other references are noted, the information in this section is taken from formal and informal interviews with the head of the service; discussions with the services' administrator; formal in-depth interviews with 19 of its' employees; numerous attendances at three of the service's four offices; attendance at one of its' access centres; observation of four actual and one simulated mediation session and a limited review of some of the records of the service. The information was updated in the summer of 1988.

97 Report of the Interdisciplinary Committee on Conciliation (1983): appendix 6; Newcastle Report (1989): 383.

98 NFCC is the national organization for mediation services in England that were independent of other services and the courts. Until the Family Mediators Association was formed in 1989, it was the only national mediation association in England.

service, five child access centres, and guardian-ad-litem and adoption panels. All court-welfare officers were also guardians *ad-litem*.[99]

While SELCWS shared facilities, secretarial and administrative support staff with the Family Conciliation Bureau (Bromley), mediation was a separate service. All of the court-welfare officers were expected to do mediation when needed but never with clients with whom they were involved on a court-welfare basis. In addition to the mediators who were also court-welfare officers, Bromley had thirteen other mediators affiliated to the service, including two mediators who were in training and one who had recently retired from active practice. All of Bromley's mediators were expected to have a minimum of five years of experience in their professional or occupational fields before approaching Bromley for mediation training. All were then expected to observe three complete mediation sessions and to work with an experienced mediator for a six month probationary period before becoming affiliated to the service. The mediators who were not also SELCWS officers were drawn from the legal profession, probation, social work, psychology, Marriage Guidance,[100] and the Citizen's Advice Bureau.

Whenever possible, Bromley's mediation services were provided by two mediators: one male and one female. This was not always possible because a few of the mediators preferred to work alone and because women outnumbered the male mediators by two to one. In addition to trying to provide gender balance in the sessions, the service also attempted to provide professional balance by pairing mediators with legal knowledge with those with social/pshychological knowledge.

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99 Despite the extra services administered by this office, in 1986-1987 each SELCW officer was completing over 65 court-welfare reports per year. The administrator's records indicated that in 1986 the senior and four court-welfare officers completed 344 court welfare reports, including reports for adoptions and section 41 hearings, but excluding updates and reports sent by the service elsewhere for completion. In 1987 an additional officer was added. During 1987 up to October 20, 1987 the agency's records indicated that 316 reports had been completed.

100 Now 'Relate'.

G. Davis and M. Roberts completed a consumer study of the Bromley service which was published in 1988.[101] The authors reported that in 1986 there were 302 referrals to Bromley for mediation.[102] They also report that, of these, 146 cases were actually seen jointly for mediation sessions.[103] J. Graham Hall reports that in 1987, 182 couples attended the service for mediation sessions and that it was estimated that the number would exceed 220 in 1988.[104] In 1987 the coordinator of SELCWS's affiliated services reported that most of the Bromley's mediation clients were coming from South-East London and that they reflected the lack of ethnic/cultural diversity of the area.[105] Bromley's mediation model required the participation of both parents or disputants. If one of the adult disputants was not interested in mediation, therefore, neither could attend. This does not mean, however, that they could not use any of SELCWS's affiliated services. Those who could not persuade their spouses to attend mediation appointments could opt for individual counselling, but as a separate service.

Bromley was careful to keep all of its' services separate from each other. If a mediator provided counselling to an individual or couple, he or she would not subsequently participate in that family's mediation. Nor would a mediator subsequently provide counselling services to members of a family seen in mediation. Similarly mediation and court-welfare reporting were kept totally separate. Information obtained during mediation sessions was not made available to an officer writing a court-welfare report and the two services were never provided by the same officer with the members of the same family.

The Bromley service handled child custody, access and care and control disputes but concentrated on disputes over access.[106] Property and financial matters

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101 G. Davis and M. Roberts (1988).
102 Ibid.: 38.
103 Ibid.: 38.
104 J. Graham Hall (1989): 79.
105 See also: G. Davis and M. Roberts (1988): 152.
106 G. Davis and M. Roberts (1988): 47.

were not normally discussed unless resolution of those issues was crucial to the resolution of the child issues. In these cases financial and property matters might be discussed in very general terms, any agreement reached would normally not form part of a written agreement, and the matter would be referred back to the disputants' solicitors for resolution of the details.

In 1987 Bromley was operating off court premises. Mediation on court premises was rare, although it was provided on occasion. In-court mediation was most likely to arise at Bexley Magistrates' Court on domestic days. On those days the SELCWS had a court-welfare officer available on the court premises to assist the court:

> We do court duty at Bexley and very often they will ask you to see a couple before court. So we do a bit [of mediation] there but not in a formalized manner. [It is just to] see whether we can sort something out. (court-welfare officer)

SELCWS did not have officers in court in the other Magistrates' Courts on domestic days but had an officer from the service available to the courts on call.

Bromley mediators were reluctant to provide mediation on court premises, however:

> Oh yes I have done it on the court premises and there is so much pressure on people there. You can say it until you are blue in the face: "I'm not connected to the court, I am totally separate." They do not believe you. You are sitting there. It is another way of the court telling parents what to do ...: "you will reach an agreement or else!" What kind of decision making is that? I would not like to see it developed any further in court. (conciliator)

Consequently the Bromley service conducted the vast majority of its' mediation appointments in SELCWS offices, away from court premises. The majority of Bromley's clients were not referred to the service from the courts. The coordinator of the service estimated that about 20% of the service's mediation case load was coming to the service by court referral. Most of the others came from court-welfare officers[107]

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107 The court-welfare officers who shared premises with Bromley's mediation service, referred families to mediation when they found, during the course of a welfare investigation, that the family they were investigating might benefit from the service.

(approximately 20%), or from lawyers (approximately 40%).[108] The remainder were self referrals or referrals from miscellaneous sources (for example neighbors, other professionals and public service organizations).

Bexley Magistrates' Court sent the Bromley service the names and addresses of all disputants making their first application to the court if those applications concerned children. Upon receipt of the names and addresses, the Bromley mediation service wrote the disputants offering a mediation appointment. Some of these offers were accepted, others were not.[109] The judges and registrars in the other courts referred disputants to Bromley if and when they felt the service would be helpful. Attendance at Bromley was purely voluntary, however. At the beginning each session disputants were advised that they were under no obligation to participate in mediation and that they could leave at any time.

By the summer of 1988 Bromley's intake of cases from the Croyden County Court had changed with the initiation of 'children's preliminary appointments'.[110] All those making new applications to the Croyden County Court concerning children were now being scheduled for a preliminary meeting with SELCWS officers on the court premises. The court's registrars and judges were not in attendance at this meeting. The disputants with their legal advisors were expected to attend. The purpose of the meetings was to explore, with the disputants and their legal advisors, whether or not mediation was a viable option for the disputants and if not, what other options would best meet their needs.

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108 These percentages were estimates given to me by the coordinator of the service. In their study of this service G. Davis and M. Roberts(1988): 39] found that of the parents they interviewed in 1982, 33% said they had first heard of the service from their solicitors and 31% from the courts or the court-welfare service.

109 New mediation processes have now been instituted at Bexley Court. See: C. Pilmore-Bedford (1990): 204-9.

110 J. Graham Hall (1989): 79. See also: F. Gibbons (1990): 246-7 on the first 18 months of operation. The Croyden procedure described here was subsequently also instituted at the Bromley County Court, see: F. Gibbons, above.

The options to be explored included: using one SELCW's access centres; engaging in mediation; meeting the registrar to sort out technical/legal matters; initiating a court-welfare investigation; scheduling the matter for trial if a court-welfare report had been prepared in the previous six months and there seemed little hope the case could be resolved; or conducting a court-welfare enquiry at the same time the disputants were participating in mediation. In the latter event mediation and the court-welfare investigation would be conducted by different people in different arms of the service. The SELCWS envisioned the use of this option when the disputants felt there was some urgency in the matter. It was anticipated that this option would allow parents to engage in mediation without the fear that it would delay the legal process should it prove ineffective. Attendance at Bromley for mediation thus remained voluntary, while discussion about the availability of various court options became obligatory.

The Croyden County Court was asking lawyers not to file affidavits until after the children's preliminary appointments and the termination of any subsequent mediation sessions. A maximum of six preliminary appointments with court-welfare officers from SELCWS were being scheduled at the court every fortnight. Each meeting was scheduled to last 25 minutes. If, at this appointment, the parents indicated a willingness to try mediation, they were then referred to one of Bromley's mediators who was also in attendance at the court. The in-court meetings with Bromley mediators were expected to last one-half hour and were expected to be purely exploratory. The implications of mediation would be explored again and if the service was still acceptable to the disputants, the parties would be scheduled for full mediation at one of Bromley's offices. The actual mediation appointments were to be held off court premises were expected to follow the regular Bromley mediation process we shall examine shortly.

At the termination of these in-court meetings, the parties would invariably see one of the registrars to confirm the procedure agreed on or to make any order necessary. The SELCW and Bromley services were finding that the new procedure was

increasing Bromley's mediation case load and speeding up SELCWS's court-welfare enquiry process.

Bromley operated from four offices in the south-east of London. These were located at: Bromley, Erith, Bexley, and Croyden. The main office at Bromley handled all the scheduling, coordinated services, and housed the majority of Bromley's mediation appointments.

The Bromley office was located in a large residential house. The atmosphere there was always warm and inviting. Two waiting rooms, containing children's toys and magazines, were available for clients waiting for appointments. Two large, but unimposing rooms were available for mediation sessions. A low coffee table surrounded by four chairs of equal size was located in the middle of both rooms. The service made it a practice to serve tea and biscuits to mediation clients part way through all mediation sessions. G. Davis and M. Roberts found that clients were appreciative of this personal touch and that it helped them to relax.[111]

The other three mediation offices were used when needed. The service had the use of a probation office at Erith on Wednesdays when the probation service was otherwise closed. The room used there for mediation was very large and bare. In fact it was too large, more like a conference room than a family meeting room, but at least it could be partitioned off into two sections. The premises were not as pleasant as those at Bromley and there were no facilities for serving tea and biscuits but it did enable some to use the service who might otherwise have been unable to do so.

A room in a probation office was also made available to the Bromley service by the Probation service at Bexley. The Bexley probation offices adjoined those of the Bexley Magistrates' Courts. Bromley attempted to schedule any mediation appointments at Bexley on the Court's domestic days so that a mediator from the service would be available to collect referrals for mediation. I did not visit the fourth out-of-court office

111 G. Davis and M. Roberts (1988): 43.

located in Croyden, a short distance from the courts. That office consisted of two rooms located in premises otherwise occupied by the Red Cross.

The Bromley mediation service provided dispute resolution and not therapy to it's clients. The service's goal was to enable disputants to make their own arrangements for their own children by encouraging and assisting them to communicate and negotiate with each other. The service viewed treatment of individuals and families as falling outside the scope of mediation.

Wherever mediation was conducted, Bromley used a similar model (minus the tea, coffee and biscuits when facilities would not allow). The parents would first attend a joint preliminary meeting with (usually) two mediators. At that meeting Bromley's procedural rules would be explained: that the service was independent of the courts; that attendance was purely voluntary and the disputants were under no obligation to continue and could leave at any time; that the mediators would not pressure the family to reach any or a particular agreement; that the purpose of Bromley's mediation process was to enable the family to reach some consensus about arrangements to be made for the children; that the sessions were entirely confidential and nothing arising from them would be reported to anyone; that the exception to this was that any matters concerning physical or sexual harm might have to be reported to the proper authorities to ensure everyone's' safety; and that each disputant would have a chance to meet separately with the two mediators to explain his or her position without interruption from the other. Prior to meeting each disputant separately the mediators also explained that nothing either disputant said in their individual session would be kept secret from the other disputant(s) and that all concerns raised would be introduced in the joint meeting for discussion. Consents were then sought to allow the mediator(s) to stop the session at any point should discussions become too heated.

Each parent was thereupon interviewed apart from the other jointly by the two mediators. During the separate interviews each disputant was given a limited

amount of time (normally ten to fifteen minutes) to address the issues uppermost in his or her own mind. These separate sessions served several purposes. They encouraged each disputant to begin talking and allowed each to voice fears and complaints that he or she might have found difficult to raise in front of the other disputant. The individual meetings also allowed the mediators to begin to focuss the disputants' minds on their children without risking the appearance of siding with one disputant over the other.

After the two individual interviews all four parties reconvened in a joint meeting. One mediator then introduced to the meeting the concerns of one of the disputants and the other mediator introduced the concerns of the other:

> What is important particularly after the mediator has seen each party separately is to summarize what the mediator has heard each party say and to say exactly what each party has said but without all the recriminations, all the emotional anger, hate and hostility. That would be counterproductive. The mediator has to restate the issues as the parties see them so that the issues stand clear. (conciliator)
>
> That is important. It is a very important skill: to know how much to feed back, not holding back on things but down playing the negative ... by picking up on the positive you can make it seem that there is very little between them and [can] encourage them to bridge that gap. (conciliator)

This introduction must be done in an even handed and balanced way to ensure no perceptions of bias or favoritism are created. Some mediators in the Bromley service reported the concerns raised in the separate sessions back to the person who made the comments, some reported the concerns back to the other disputant, and some to the meeting in general. My impression was that it did not matter terribly much which method was used as long as the second mediator followed suite. If not problems arose. For example, if one mediator addressed the concerns of one disputant to the second disputant, he or she could appear to be adversarial if the second mediator reported the concerns raised by the second disputant back to that disputant.

As each mediator completed the introduction of the issues and concerns arising from each individual meeting, the person who had raised the issues was invited to add to or to correct the mediators' presentation. This was to ensure that all matters in contention were clearly brought before the session. Then the process continued as a four-way meeting. During this period the mediators tried to encourage the disputants to talk directly to each other;[112] worked to keep the focus of discussions on arrangements for the children; emphasized positive comments and areas of agreement; helped the disputants state their concerns and propose solutions in positive rather than negative terms; and intervened to prevent the repetition of unproductive comments. Most disputants attended only one mediation session of between two and three hours duration, although increasingly the service was offering more sessions if these were needed.[113]

Children were not normally involved in mediation sessions at Bromley, although there were occasional exceptions. Children might be seen apart from the parents by one of the mediators if this was requested by both parents. That mediator might then report the concerns raised by the children to the parents during the parents' mediation session. In 1987 this was done very rarely and then only upon parental request and with older children. After the parents have reached a tentative agreement, older children (twelve plus) might be included in a final mediation session to help their parents iron out specific details to take into account the children's schedules.

The practice concerning mediated agreements in this service varied somewhat by individual mediator and from case to case:

> We have it typed up. We give them each a copy and if they want to give it to their solicitors, we also give them a copy for their solicitors and put one on file. They don't sign. (conciliator)
>
> We don't have any set procedure. It is helpful to have each party state at the end of the session ... even at the risk of raising hurdles, what they

112 This was done where possible. When couples were too emotionally distraught to be able to do this, the mediators allowed the disputants to continue to channel their comments to each other through the mediators.

113 See also: Davis and Roberts (1988): 44.

> understand the agreement to be. If they don't want it written down we may ask them what they understand the agreement to be when we fill in the pink forms [agency records]. Sometimes if they want it written down, they will write it or sometimes the mediator [will write it down]. It depends on the level of conflict . . . and whether or not there are complicated details. We ask them what they would prefer. If there are a lot of details it is usually sensible to have it set out. (conciliator)

Whether the agreements were oral or reduced to writing, this service left it up to the disputants to approach their solicitors to have them formalized or turned into court orders.

Court-welfare investigations and mediation were kept entirely separate by this service. The administrator, who was crucial to the co-ordination and smooth running of all of SELCWS's and Bromley's affiliated services, ensured that none of the service's investigating officers had access to mediation files. A court-welfare officer who had been involved in a mediation session with a particular family would not investigate the same family for the courts. Clients might, however, be involved with both sections of the service at the same time. For example, a SELCWS officer might refer a family to mediation in the middle of a welfare investigation:

> I'm working out whether it is appropriate to refer [a case] to conciliation when a welfare report has been ordered. The view in this office is if you get a court-welfare report and you think conciliation would work, you can say, "go off to conciliation" and I'll do my report. (court-welfare officer/conciliator)

In 1987 the normal practice when a case was referred from a welfare enquiry to mediation was that the welfare enquiry would normally be held in abeyance until mediation had concluded. If there was agreement arising from mediation, the report would include reference to the terms of that agreement. If mediation at the Bromley service did not result in agreement, the SELCWS court-welfare enquiries would be reactivated. By 1988 the practice had changed somewhat in that it was envisioned that in some cases, in order to speed up the process for the disputants, the two processes might be carried out simultaneously by different workers from the two services.

Although court-welfare investigations and mediation are normally considered to be different processes[114] we shall see, as we move through the descriptions of the various mediation services operating in Greater London, that some services combined the two processes or included aspects of mediation in their welfare investigations. Only those Bromley mediators who were also court-welfare officers and employees of SELCWS conducted court-welfare investigations. The Bromley mediation service did not conduct court investigations, nor did most (68%) of its mediators. SELCWS and Bromley occupied the same premises, however, and were probably closely connected in the public mind.[115] We shall end this section, therefore, with a brief discussion of the methods SELCWS used when conducting welfare investigations.

SELCWS carried out its' welfare investigations in a conciliatory manner but with the view to providing information to the courts:

> When I do my court-welfare work I will ... try to get both parties in initially to try to see if there is any way they can reach agreement ... I would take a conciliatory approach but stress [that] what was said was not confidential and would be reported to the court.(court-welfare officer)

> We see each parent in their own home, see the children with each parent, visit the schools, the family doctor or the grandparents if they are involved, living with the children or have regular access. If the family has been to conciliation and they have reached a realistic agreement and we think they will keep to it, we can write a short report. It will be all that is required. But if we feel they haven't truly reached agreement, for example one is saying "if he does this then I'm going to do that", it is a waste of time. We are setting up a new form of report now, [that will say] an agreement has been reached and the agreement is such and such, the previous obstacles were such and such, so the court has some idea. It has been known for people when they get to court to say, "yes we agreed to such and such but it hasn't been working" and then you are back to square one and it needs to be adjourned again for a court-welfare report. (court-welfare officer)

The SELCWS sought a balance in its investigative processes; one that would encourage disputants to make their own agreements but at the same time would ensure that the

114 For a discussion of some of the differences, see: N. Fricker, T. Fisher and G. Davis (1989): 256-257; D. Trombetta (1981): 13-18. For a different point of view see the descriptions of services #15 and 16. For discussion of the nature and goals of mediation, as understood by Greater London's mediators, see Chapter 4.

115 See: Newcastle Report (1989): 281-284.

courts were given the information they would need to adjudicate if the disputants' agreements broke down.

Keeping court-welfare investigations and mediation separate helped Bromley's mediators to be clear about the processes they were using. Whether the mediators were able to make the divisions between services clear to the disputants, however, has been called into question.[116]

Service #6: Divorce Conciliation Advisory Service:[117]

The Divorce Conciliation Advisory Service (DCAS) was centrally located a few minutes walk from Victoria Station. The service was independent of the courts, probation, and court-welfare. When DCAS first opened its doors in 1980 it was called the Divorce Counselling Advisory Service. Initially the service concentrated on divorce and separation counselling. When it began increasingly to provide mediation services, it changed its name. In 1987 most of DCAS's work, approximately two-thirds of its case load,[118] continued to be divorce and separation counselling. The service offered no marital or family therapy. In 1987 DCAS could see most of those seeking counselling or mediation within one week.

DCAS was fully affiliated to the National Family Conciliation Council and was a registered charity. Six mediators worked in the agency. The administrator worked full time and the others on a part-time basis. DCAS employed a secretary on a part-time basis to answer phones and schedule appointments. The office was open from ten in the morning to five in the afternoon, five days per week.

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116 G. Davis and M. Roberts (1988): 41-42; Newcastle Report (1989): 281-284.

117 The information in this section was obtained from six in-depth interviews with five of the six mediators working in the agency in 1987, several attendances at the service's offices, observation of a case consultation with the agency's consultant, and review of information this agency made available to the public. The information was updated in the summer of 1988. No attempt was made to interview the sixth mediator because he had been ill and inactive.

118. This estimate was given to me independently by several of the agency's mediators. M. Oddie (1990): 67, reports that 45% of DCAS's work was counselling.

Those using the service were charged 30.00 for a joint mediation sessions or 75.00 for two separate individual appointments and one joint mediation session. By 1988 the fee for a joint mediation session had increased to 35. DCAS was authorized to collect 15 per client for mediation under the legal aid green form scheme but the service complained that this fee applied even when several mediation sessions were required. The service did not turn away those without the financial resources to pay for the service, however. Approximately one-fifth of the service's clients were seen without fee. In fact a grant from a trust enabled DCAS to repay those on social assistance for the cost of their fares to get to the service.

When DCAS first began to offer mediation, there was no available mediation training. Consequently the service had created its own training programme. This consisted of a series of ten seminars presented by a barrister, a solicitor, a person who had recently experienced divorce, and a tutor in social work. The backgrounds of the DCAS mediators were diverse: two were magistrates on domestic panels, two were social workers, one a Marriage Guidance Counsellor, and one an experienced Citizen's Advice Bureau worker. By 1988 the service had two more mediators in training. All those working at DCAS were expected to meet monthly with the service's consultant for discussions of their most difficult cases. The consultant was a psychiatrist/psychotherapist with a great deal of professional experience working with children.

DCAS received very few of its cases from lawyers. The majority of its disputants came to the service directly after seeing information about the service in publications or upon discovering the service in the telephone directory.[119] Others came

119 DCAS was the only family conciliation/mediation service I was able to locate by looking through the telephone directory. Once several of the agencies were contacted, I was able to piece together the names and addresses of the others but members of the public must have had great difficulty finding these services.

to the service after being referred by magistrates, Citizen's Advice Bureaus or court-welfare officers.

Normally only one of the disputants contacted the service, many times initially just for information and advice. If mediation was requested, the service wrote the other party to the dispute requesting his/her/their presence. DCAS reported seeing approximately 100 couples for mediation during 1986. The couples came from all over London, from outlying counties and were from a broad socioeconomic cross section of the general population: from those who were very affluent to those on social assistance.

DCAS operated from a building which resembled a family residence. The inner entrance to the office was located at the end of a long hall. That entrance lead into the service's only reception/waiting area which also served as the part-time secretary's office. The lack of separate waiting rooms limited the type of service the agency could provide:

> Because of the office at Ebury Street we can't do what they do at Bromley, have them come in together and then see them separately ... We have to have them in on different days. We don't have a waiting room, facilities like at Bromley where they have a whole house and where if they [the disputants] don't want to see each other they can wait in separate rooms. (conciliator/global mediator)

The waiting room opened directly into an adjoining room used for mediation sessions. The room was small but informal and reasonably pleasant. It contained several bookcases, chairs arranged in a circle in the middle of the room, and a table pushed off to one side in a corner.

Children did not usually attend mediation sessions at this service:

> We have [included children] about three times and it hasn't been all that good because my basic premise is we should help parents be parents and therefore we shouldn't either be telling the children what the parents ought to do nor should we be asking the children because I don't think one should ever ask a child what they want to do. (conciliator/global mediator)

> No. We really take the view that John Haynes has: you help people be good parents but they run their own parenting. (conciliator/global mediator)

DCAS did not limit mediation to child issues. The service provided global mediation covering disputes about the marital home, maintenance, finance and the division of property:

> Initially conciliation was seen as providing a forum where parents could work out the best way to continue as parents, sharing the care of their children even though they felt unable to continue as partners. This limited the work to questions of custody, care and control and access. It has become evident to us that in most cases everything hinges on decisions about the marital home and maintenance ... We do discuss maintenance with our clients particularly if they have not been to a solicitor . . . It is no use agreeing on freedom of access to the non custodial parent if all he can afford is a bed sitting room.[120]

> If they are a couple who haven't got children, they won't be seen by many other conciliation agencies if they want to talk about money and the property division. (conciliator/global mediator)

Many of DCAS's clients were coming to them early in the divorce process:

> [It is] mainly pre-divorce when they come, where the mom says, "I'm going to take the children and live in Cornwall. Will you pay the train fare?" (conciliator/global mediator)

The agency did not classify its mediation as being rooted in either dispute-resolution or family therapy. The service preferred to say that it was doing crisis intervention:

> I don't think we are focussed on either dispute resolution or therapy. We are focussed on crisis intervention, not on dispute resolution. It is quite often therapeutic for them to sit and talk to each other, to lose their temper and to screen at each other. So it is quite therapeutic but it is not therapy. (conciliator/global mediator)

DCAS integrated counselling and mediation. Referrals were commonly made from one branch of the service to the other and mediation sessions were often preceded by individual counselling sessions:

> Say I have Mr. Brown down for this afternoon. Depending on what problems he presents, I will say to him, "Could someone else see your wife?" So one of the others will see her on a different occasion and then the four of us will get together ... If the other parent won't come then we continue with counselling. (conciliator/global mediator)

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120. Copy of letter containing DCAS's response to the Newcastle Conciliation Project Unit's request for information. A copy of the letter was given to me by the head of the service.

The mediators were careful, however to distinguish the two processes for clients:

> Our first thing is to say conciliation is a very definite process. We differentiate it from counselling (conciliator/global mediator);

and the service referred disputants to a third counsellor if extensive counselling became necessary during the mediation process:

> Obviously if somebody is terribly angry or hurt it is quite sensible to refer them to another counsellor who may have six or seven sessions and then come back so that one [of the disputants] doesn't feel disadvantaged because he or she has seen one of us [the conciliators]. If it comes to that I would send them to one of the others and then come back into the foursome here but [I would] not [send them to] a conciliator. (conciliator/global mediator)

While the Bromley mediation service disclosed all matters arising in separate sessions in the joint mediation session, DCAS choose to maintain confidentiality from the individual sessions:

> You have to constantly reassure people when we first meet. "Tell me what it is you don't want your wife to know because when the four of us meet and I say you remember your told me the last time we met that you had a baby with someone else who is living in Scotland.." Obviously not but if we plan a foursome we must be clear about what we can say and cannot say. (conciliator/global mediator)

After the individual sessions the disputants were seen jointly with both mediators in attendance.

We discuss the relationship between mediation and counselling in chapter 12. If counsellors provide personal support to their clients and develop allegiances with them, as the counselling literature suggests,[121] then DCAS's mediation process must have contained elements of support and advocacy not found in other out-of-court mediation models.[122]

The process used by the service changed somewhat depending on whether or not the family's dispute included matters about the children. Before we look at those differences, we must understand how DCAS mediators used the terms 'mediation' and

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121 See chapter 12.

122 The process begins to resemble the four-way settlement meetings used by family lawyers. See chapter 9.

'conciliation'. The term 'conciliation' referred to dispute-resolution processes dealing with any matter in dispute (including disputes over property, maintenance and finance) if the dispute also involved children. The term 'mediation' was used when families wanted assistance with disputes having nothing to do with children:

> In conciliation the focus is on the children. Mediation is for those who have no children or the children are grown up and they simply want to divide the goodies. (conciliator/global mediator)
>
> [We use mediation] if they are a couple who haven't got children, they won't be seen by many other conciliation agencies if they want to talk about money and property division. Either [they have] no children, the children have grown up or there is no dispute in that area. Usually if there are children, the children are in issue. (conciliator/global mediator)
>
> Mediation to me is anything which isn't conciliation and isn't counselling. It can be about any other area except the children. (conciliator/global mediator)

Normally, if the arrangements for the children were in issue, each party to the dispute was first seen separately by a different worker for between 1 and 1 and 1/2 hours:

> In mediation we see them together whereas in conciliation we would usually, unless it is very unusual, see them separately first, each one seeing an individual counsellor and then jointly. (conciliator/global mediator)

When the disputants were dealing only with property or financial matters, however, they were normally seen together from the beginning and by usually only one mediator:

> Mediation is done with one person [mediator]. If it is simply a married couple whose children have left and grown up or a couple with no children, they come in and see one counsellor and she helps them to sort it out and then they are referred to a solicitor because they want a consent order drawn up. (conciliator/global mediator)
>
> In the case of mediation we follow basically the same process but less effort is made to try to get two people [mediators]. (conciliator/global mediator)

In all cases, the first part of the joint mediation session was normally devoted to developing an agenda for discussion, and setting out the agency's mediation rules.

Each disputant was then encouraged to present the dispute as he or she saw it without interruption from the other(s)::

> We start with a contract [we] set with the clients at the beginning of the session. We prepare the program of what we are going to do and ask for permission to interrupt if it gets too hot and warn them that if there are any allegations about child abuse, we are bound to report them. We tell them at the beginning. Everything else is confidential. (concliator/global mediator)

> When we start off ... we try to set an agenda and try to stick with it. Perhaps [there would be] up to five sessions on whatever they see to be the most important issues ... They take turns to talk about . . whatever it is they feel is the most important at the moment ... We will say to the other person, "please don't interrupt." They will have their say later. (conciliator/global mediator)

The sessions then continued with joint discussion of the issues in dispute.

Normally cases involving children were completed in less than four sessions and those not involving children in one or two. We might wish to compare this to the usual number of sessions conducted by Solicitors In Mediation (SIM) (service #16), which also offered global mediation.[123] The difference suggests that the type of property and financial disputes being submitted to DCAS were far less complicated or that DCAS was not dealing with property and financial disputes in nearly as much detail as was SIM.

DCAS sometimes arrived at temporary agreements to allow disputants to try new arrangements on a trial basis. If the disputants had solicitors, any agreements were normally reported to them in brief letter form:

> We write to both solicitors: "We have seen your clients and they have agreed on joint custody or they have not agreed on joint custody." "They have agreed on A and C but not on B." We send the letter to both solicitors and they themselves have a copy. It is in letter form. On property it is basically the same. (conciliator/global mediator)

As we move through the descriptions of Greater London's mediation services, we shall find that many of the agreements being referred to were very simple and general in form. Were the disputants' legal advisors using these as starting positions and

123 See also: A. Berg (1983): 25, S. C. Grebe (1988a): 237.

negotiating the final agreements themselves, or did these very general, loose agreements eventually become legal documents? Were the mediation services merely setting the scene for conflict resolution, or were they actually resolving conflicts? This needs further investigation.

By the summer of 1988 DCAS was training two more mediators and was considering instituting a counselling, information, and dispute-resolution service for grandparents. DCAS was independent of the courts and of probation, so it did not conduct court-welfare investigations for the courts.

Service #7: Havering Family Conciliation Service[124]

Havering Family Conciliation Service (Havering) was independent of probation, court-welfare, and the courts. In May of 1985 members of this service set up a steering committee to look at the possibility of establishing a mediation service to serve the Greater London borough of Havering.[125] The service began operation in October of 1986 with the assistance of four mediators and one administrator. The service's public brochure indicated that the mediators would not impose any solutions on the disputants. (The brochure also claimed an affiliation with the National Family Conciliation Council but while affiliation was intended, it had never took place.)

Havering's chairman was a church representative and its administrator was a magistrate (domestic panel). The service's management committee was composed of a solicitor, another member of the Council of Churches, and representatives from probation, Marriage Guidance, social services, the Citizens' Advice Bureaux, and the Magistrates' Court. One of the mediators was a social worker, one a social-work teacher, another a retired court-welfare officer, and another a counsellor/therapist.

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124 The information which follows, except where otherwise noted, was taken from in-depth interviews with three of the service's four mediators, a joint interview with the head and the chairman of the service, and from interviews with two of the service's probation officer advisors. I collected no further information about this service after October of 1987.

125 Report of the coordinator of the service to the Havering steering committee September, 1986: 1.

Prior to offering mediation each mediator had attended a training programme given by two probation officers one evening a week for five or six weeks. The course covered subjects mentioned by NFCC in its' educational publications. The service had intended its mediators to meet with their probation-officer advisors for case discussion and guidance every three weeks, but the lack of work prevented this:

> We meet at the probation office and discuss the sessions. We had imagined we would meet every four to six weeks but there hasn't been enough work so we meet every couple of months. (conciliator)

The service started with 850 in grants and donations from various clubs and organizations, probation services and the local borough.[126] This enabled the administrator to purchase and install a separate telephone line and answering machine in his home and to print advertising pamphlets. Clients were charged 20 (10 each) per case regardless (within reason) of the number of sessions.[127] Havering did not have an office (other than the location of the answering machine in the administrator's home) but had the use of four offices in church-related and local charity premises. The service expected to schedule many of its mediation sessions in the evenings or on weekends.

While the intention of the service was to serve the Romford and Havering areas, Havering did not intend to prevent people from outside those areas from participating in the service. During the first five to six months of operation the service had only completed four mediation cases although they had received over fifty enquiries. By October of 1987 they had handled nine cases and had two more cases scheduled. This low rate of demand is not unusual for beginning mediation services.[128]

The Havering service saw its' role as helping parents reach agreements without bitterness so that the children would not be used as pawns in the dispute between them:

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126 Ibid.

127 Havering Family Conciliation Service brochure.

128 A. Bradshaw (1986) 3; S. Margulies (1987): 182; M. Mercer (1987): 3; F. Perlmutter (1987): 15; J. Walker (1989): 42.

> The goal is really to take away the aggravation so that the children are not used as pawns in the game. Parents will use the children to almost blackmail each other, particularly over finance: "If you don't increase my maintenance by 10 per week, I won't give you access." So if we can get mom and dad together to talk it through, to help them make a decision, then the less able they are to use them as pawns. So mom and dad realize they are still parents ... to give the children the right to still have a relationship with mom and dad. (administrator)

> [*What do you see as the primary goal of mediation?*] To help the couple come to an agreement about custody and access of the children without bitterness and in as agreeable way as possible, one where both are more or less satisfied. Sometimes it has to be good enough ... That is what I'm trying to do: set up a good enough agreement between the two. (conciliator)

All members of the service were in agreement that they should not handle disputes concerning the division of property:

> I don't think property should ever come into it: the splitting up of the marital home, the marital assets. I think that is a job for solicitors. There are so many pitfalls and I think mom and dad have to be legally advised ... The focus is on the children and I think if we ever went down the property route, we would be sidetracked from the children's needs. (administrator)

Some, however, were prepared to offer families assistance with their financial disputes:

> We find that parents see a connection between custody and access and finance. We were told by the local solicitors that we should steer clear of finance and I am saying, "No, we won't steer clear of it." If it is brought up by mom and dad in a conciliation session, conciliators must grasp the nettle and enable mom and dad to talk about finance. At the end of the day, if they make a decision about property and finance, then they will go back to their solicitors to look at the legal implications. (administrator)

The administrator screened all requests for appointments to ensure that the cases were amenable to mediation:

> When we get a call, it comes to me as administrator. It is my duty to tell people what conciliation is - because we get calls which are inappropriate for conciliation. With my background I can say, "Well you've got to go to Marriage Guidance, social services, the courts, and I can tell them where to go. If the case is appropriate, I will explain the terms under which we will conciliate, get the names and address of the other party. Then I would write to get his or her [the other party's] agreement [to attend conciliation sessions]. (administrator)

Disputants were asked to sign a pre-mediation agreement specifying the terms of the process. Among those terms were the service's rules concerning family/child violence and abuse:

> We try to get mom and dad to sign an agreement beforehand to abide by our rules which specify that if child abuse or violence is indicated, that we would have to report that to social services, so they know that beforehand. (administrator)

Havering had developed an intake sheet to be completed once the disputants agreed to attend mediation sessions. The sheet included the names and addresses of the disputants and their solicitors (if any), and the names and birth dates of their children. It also specified whether or not the solicitors and the other party had agreed to mediation; the other agencies, if any, involved with the family; and the particulars of any existing orders or legal proceedings.[129] The service made it a policy to gain the consent of any solicitors, or other agencies involved with the family prior to proceeding with mediation.

The mediators worked singly and normally saw the disputants together throughout the process. It was envisioned that cases would normally be completed within three, one hour sessions:

> We have thought three, one hour sessions would be enough ... If after three meetings, you still don't have a decision, then I don't think you are ever going to get a decision. You have to agree with them then that a decision will have to be imposed by the court. (administrator)

Havering had not yet established any firm policy with respect to the inclusion of children:

> That is open to the parents and the conciliators to come to an agreement on that. Normally the conciliator would see the parents alone first [all three conciliators agreed they would only see children after first seeing the parents] and then perhaps the children one by one. Whether they are involved in the [conciliation] session [with the parents and the conciliator] must depend on the parents ... We have got to take a view that our conciliators are professionally trained and we must respect their approach. (administrator)

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129 Havering Family Conciliation Service, blank form of intake sheet.

The majority of Havering's cases dealt only with access. Any agreements were signed by the disputants and by the mediator, and copies were sent to the disputants and their solicitors, if any:

> They each sign it. The conciliator signs it. It comes back to me. I take a photostat of it and send it to both parents and both solicitors. I keep the original here ... If they don't have a solicitor we give them each a copy of the agreement they have made in case they eventually go to court when they can present it to their solicitors or the court. Any agreement they come to is not binding on the court. The judge or registrar can always override it if they don't think it is right but if we have credibility in the field, then I don't think the court will lightly override it. (administrator)

If the disputants had solicitors and had reached no agreement in mediation, the service sent the solicitors a form stating that mediation had been tried but no agreement had been reached.

At the end of October, 1987, the administrator of the service was moving and the service was in the process of looking for a replacement. The service was still not listed on NFCC's list of affiliated, independent services in December of 1989.[130]

Service #8: Jewish Family Mediation Service[131]

The Jewish Family Mediation Service (JFMS) was independent of the courts and probation services. The service was fully affiliated to NFCC. It had a governing cross-disciplinary management committee which included a barrister, solicitor, representatives from Marriage Guidance and the Jewish charities, and representatives from among the mediators and members of staff.

JFMS was located in a building of residential style. The main waiting area was located on the ground floor and was shared with other agencies also occupying the premises. Because JFMS had many rooms available to it in the building, separate waiting areas were available for disputants if necessary or requested.

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130 National Family Conciliation Council, Newsletter, (December 1989).

131 The information which follows was taken from in-depth interviews with the administrator of this service and ten of the twelve mediators who worked there. The service was contacted again during the summer of 1988 to see what, if anything had changed.

The service started offering mediation in April of 1986. Appointments were offered Wednesday afternoons and Sunday mornings. In addition to mediation, JFMS also offered one-half hour information and advise sessions to individuals wanting help at any stage in the divorce/separation process:

> We have a team of four workers who are very skilled offering support but not counselling, making referrals which might not be to our own service. The advise service is for anybody: grandparents, stepparents; anybody affected by divorce can come to see one of our workers . . . (conciliator)

The service also ran annual group divorce experience courses; and offered a short-term psychotherapy programme for children up to the age of eighteen whose families were separating. Discussion groups for grandparents and stepparents facing difficulties stemming from the divorce and separation of others were planned.

Clients were charged 15 each for the joint mediation sessions. Fees were collected by an administrator and not by the mediators. The mediators who were affiliated to this service came from a variety of backgrounds: social work, psychology, marriage counselling, therapy, the bench of a Magistrates' Court, chartered accountancy, and court-welfare or probation. Two, one of whom was a doctor, came from occupational backgrounds not usually associated with mediation. Eight of the mediators were female, five were male. All had taken a thirty-five hour mediation training course extending over a fourteen week period on law, mediation techniques, Jewish demography and law, the effects of divorce and separation on children, and had observed mediation sessions, before beginning mediation. All JFMS mediators were expected to attend monthly training seminars.

JFMS accepted referrals from any source but had not managed to generate much public demand for the service. In its first year of operation, the service had only completed three mediation cases. During 1987 the service managed to increase its

clientele somewhat but was still acutely underutilized.[132] The service's aim was to handle about thirty mediation cases per year.

JFMS was established to handle the specific concerns of Jewish families. They expected to serve clients who:

> would all have Jewish children. If the mother is Jewish, then the children would be Jewish. If the father is Jewish, that doesn't determine it. Although if we had a couple who had a Jewish concern, for example, if the mother was not Jewish and the children were being brought up to be Jewish, . . we would not turn them away. (conciliator)

This service handled mainly disputes over access but would also handle disputes over custody and care and control of children. JFMS did not handle property and financial issues. It was prepared, however, to extend mediation services to families needing assistance with a variety of disputes extending beyond those arising on separation and divorce:

> We are prepared to mediate anything, problems between parents and children, grandparents and children. (conciliator)

> We had a grandmother who got a mediation session going for her son and his children who were thirteen and sixteen. The ex-wife . . didn't want to come so we set it up for him and the children ... and where a daughter was marrying a non-Jew and her parents were unhappy about that. (conciliator)

This service provided dispute-resolution using the same mediation model developed by Bromley (Service #3). Most cases were expected to be completed in one session of three hours in duration. The service was prepared, however, to offer two sessions in some cases:

> We haven't yet switched to two sessions but if someone is getting tired we will give them more ... or if the session has to be cut short. On Sunday we work from eleven o'clock to twelve thirty and then sometimes it takes two sessions. (conciliator)

JFMS was also considering the possibility of holding a second session for the purpose of assisting the parents or providing a forum for the parents to discuss the arrangements they had made with their children.

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132 The lack of consumer demand was endemic in the out-of-court mediation agencies.

JFMS mediators worked together in male/female teams. Sessions started with an explanation of the process. This explanation was given to the parents jointly:

> People are initially seen together. We explain the ethos of the service, find out how people came to hear of the service, explain some of the ground rules. We gain people's permission to intervene if things get too heated and to actually terminate things or to call a halt or cooling off period. We explain why we are there, and what the structure will be. (conciliator)

After the joint explanation, each disputant was seen individually by the two mediators and allowed time to explain the dispute and problems as he or she saw them. All four participants then reconvened for joint discussions which started with each mediator presenting the concerns of one of the disputants as expressed during the individual meetings. This isolated the issues in contention and laid them on the table for discussion. As at Bromley, matters arising during the individual sessions were shared with the joint meeting. The service had also adopted Bromley's habit of serving tea and biscuits part way through the session to break the tension and to emphasize the non-official nature of discussions.

The parents always attended mediation at the same time. One or both of them, however, might have been seen individually by a member of the service prior to mediation for information and advice:

> We always see them together, except in information sessions. Because we haven't been busy, we have felt that we should respond to every enquiry and not turn cases down ... I used to think that [mediation would not work] where one party does not want the divorce but now I have changed my mind because we are looking at the needs of children and the arrangements need to be made regardless. I think therefore that we should see them. Ideally if one of the parties is unhappy, I'd like him or her to have three or so sessions with one of the information and advice workers beforehand to see if they can come to terms with it [the inevitability of the divorce], perhaps even to refer them to therapy or counselling [outside of the service] for additional support. (conciliator)

The services were kept separate, however, and if one of the members of the service had been seen for information and advice, that worker was not subsequently involved in the mediation sessions.

The Jewish service did not include children in the decision making process:

> I definitely don't like children being there although people say children are there during quarrels, most of those quarrels are not about what happens to the children. I don't think they should be exposed to that and I don't like the power it gives them either. (conciliator)

They were willing, however, upon the request of parents, to include them collaterally by having them seen by a third mediator who was not going to act as a mediator in the sessions with the parents. That person might then introduce the children's concerns to the joint meeting of the parents and the two other mediators:

> You can include children, not actually in the room at the same time but parallel. The one I was asked to do . . The parents wanted the children seen. I was asked to see the children and to feed back [what their concerns were to a conciliation session with the parents] while a pair of mediators worked with the parents. (conciliator)

This is one of the best methods of introducing children's concerns into a mediation session. The third worker can act as an advocate for the children without jeopardizing the two mediators' neutrality. By just repeating a child's comments, a mediator can create the impression of endorsing a particular position. This impression is likely to be strongest when the children support one parent's position over the other's.

JFMS was also prepared to include children in mediation after the parents had reached a tentative agreement, to discuss the agreement's particulars. The service also intended to offer appointments to teenage children unhappy with the arrangements their parents had made for them:

> We are intending to assist older children. If a child of fifteen is unhappy with an arrangement that has been made for them, then they can meet with the mediator to clarify the situation. Then it would be up to them whether they wished the mediator to be present in a session with either or both of their parents. [The purpose would be] to clarify what they are about because the parents might present such a confused case ... Very often older children get lumped in with younger ones and they may not be too happy about that. They may want to see the non-custodial parent on their own . . . So after the child has a choice to have a family meeting or he might decide to go to his parents on his own. (conciliator)

JFMS reported allegations of child abuse, if plausible, to a Jewish children's charity which had agreed to follow them up. The service had not yet decided whether

warnings about the potential need to break confidentiality in these matters should be given at the beginning of mediation sessions or as the need arose, preferring for the time being to deal with the situation as the need arose:

> We are working it out. We tell them the session is confidential. If we then tell them that if anything comes up, we may have to report it, that may inhibit things ... What we do is to warn them as it comes up ... That is something we have to think about. (conciliator)

Agreements were typed if the parties wished and a copy given to each. The service did not send the agreements to the solicitors involved except at the request of, or with the permission of, the disputants.

The Jewish Family Mediation Service was independent of the courts and of probation. It did not provide court-welfare reports to the courts. In June of 1988 the service reported little change except that the administrator of the service was leaving and a new administrator taking over. JFMS was no longer listed as an affiliated service of the National Family Conciliation Council's December 1989 Newsletter. Apparently the service has now lapsed due to inadequate public demand.[133]

Service #9: the Marriage Guidance Council Family Mediation Service[134]

We turn now to another independent service offered by the Middlesex Marriage Guidance Councils.[135] The Marriage Guidance Council Family Mediation Service (MGFM) started to offer mediation as an independent agency in December of 1986. This was not the first involvement of Middlesex Marriage Guidance Councils in mediation, however. Between 1980 and the fall of 1986 members of the Marriage Guidance Councils in Middlesex, in conjunction with the Acton, Uxbridge and Highgate

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133 Simon Roberts, personal communication, 1991.

134 The information which follows was based on in depth interviews with the coordinator and the twelve mediators who were affiliated with this service in 1987. The information was updated in the summer of 1988.

135 After this study was completed, the Marriage Guidance Council changed it's name to 'Relate' and this mediation service became the 'Middlesex' service [National Family Conciliation Council, Newsletter, (December, 1989): 15]. In spite of this, for consistency in the written material and in the quotations, I have continued to use the name "Marriage Guidance".

Divorce Units (Services 1 and 3) operated an independent, out-of-court mediation service commonly known as the Barnet service:

> A lot of the people who are now with Marriage Guidance [mediation service] are pretty skilled. They have been doing it with the Barnet service for four or five years. We started in 1980. For awhile we had an out-of-court scheme that covered all of Middlesex. We operated from our three units [at Acton, Uxbridge and Highgate]. (court-welfare officer, formerly associated with the Barnet service)

When the Middlesex court-welfare officers were asked to abandon voluntary out-of-court mediation in the fall of 1986, the Marriage Guidance Councils were approached to take over full responsibility for the service. Because MGFM had close connections to the court-welfare service and because it had already partly established a clientele, it had fewer problems than did the other new mediation services attracting clients. In its first two months of operation, the service handled twelve mediation cases.[136] This does not mean that the service had as many clients as it would have liked, however. Like all of the out-of-court voluntary mediation services, this one was also underutilized.

In 1987 MGFM was only provisionally associated with the NFCC.[137] While it had a cross-disciplinary management committee, it could not formally complete its' constitution because the three sponsoring Marriage Guidance Councils were seeking additional funding before committing themselves to providing this new service. The intention of MGFM, conditional upon finding adequate funding, was to establish mediation as a separate division of three Middlesex Marriage Guidance Councils; at Barnet/Finchley, Enfield, and Central Middlesex/Harrow:

> The mediation service will be a subsidiary of Marriage Guidance: one mediation service run by three Marriage Guidance Councils from one management committee. We will be operating from different areas presumably with a central telephone contact for appointments ... That is how I understand it. (conciliator)

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136 The figure was given to me by the head of the service.

137 MGFM continues it's provisional affiliation: NFCC Newsletter (December 1989): 15.

> We will each be working in our separate centres but we would be sharing education, training, support and there would be one co-ordination of the scheme. (conciliator)

In 1987 MGFM was in a state of transition. The service hoped eventually to obtain separate offices from those of Marriage Guidance and probation but were continuing to use an office in court-welfare premises at Uxbridge (see Service #1), and the Marriage Guidance office at Finchley, for mediation appointments. By September of 1987 the out-of-court mediation service at Uxbridge had moved from the court-welfare offices there to the Harrow Marriage Guidance office.

All MGFM appointments were scheduled through the Marriage Guidance office at Finchley. That office could be reached between ten and four thirty o'clock weekdays. Each mediation area normally was prepared to offer one or two mediation appointments each week, depending on demand. The service had problems in the past with disputants, or one of them, not appearing for scheduled mediation appointments. MGFM did not, therefore, schedule mediation sessions with the mediators until both disputants independently confirmed the appointment.

Disputants were asked for a contribution, depending on income, or were charged a flat rate of £10.00 for each session, but no one was refused because they could not pay. Most of the referrals to the service were coming from the Middlesex court-welfare units. Disputants were also being referred by solicitors and the courts.

In 1987 twelve mediators were affiliated with the service. In addition, two court-welfare officers from the Middlesex court-welfare units assisted occasionally. Eight of the mediators were experienced Marriage Guidance Counsellors. Three of the others were social workers and or family therapists and one was a lawyer. All were women and all worked on a volunteer basis.

MGFM handled disputes over custody, access, care and control of children but most of those coming to the service wanted help resolving problems over access. Normally the service did not handle property or financial issues:

> We only touch upon that if we feel it is entwined with the problems about the children. I mean sometimes you try to negotiate about the children but he or she says, "I don't want to talk about that because I want to talk about the house." We feel that financial matters are the province of solicitors but if they are bound up, or you have the children saying, "but father doesn't give mother any money" or the father saying, "Every time I try to talk about seeing them, she asks for more money"; you can't sleep, you've got to deal with it and settle those issues first. So it is mainly custody and access or care and control of the children but sometimes we also get involved in financial matters. At the moment I see it as the province of solicitors unless conciliators have a lot more training. (conciliator)

This quotation was not unusual. It was fairly common for mediators to say that they did not handle property and financial matters but then to give examples drawn from cases in which they had done so, or to qualify the assertion.[138]

MGFM saw mediation as a natural progression from the counselling services the Councils already provided. The mediators, who had Marriage Guidance counselling experience, emphasized that they had been trained to provide non-directive counselling. They commented that this process was similar to mediation in that both processes sought to encourage family members to take as much responsibility as possible for their own decisions. The mediators did, however, distinguish between the two processes:

> I have to turn off my counselling because counselling is an on-going process that could last six months, could last one year whereas structured mediation will take one, two, sometimes three sessions and you are not going into the family background. You are helping them to communicate and mediate with their partners. It is like negotiating a contract. ... although you will have some feelings from them, your job is not really, although you allow a little bit of feeling, is not to allow the amount of feeling that you would in counselling. (conciliator)

This mediation service is difficult to describe. There was considerable disagreement within the service about the goals of mediation and the methods used varied from mediator to mediator. Consequently we shall take a look at some of the variation.

Most of the MGFM mediators saw their own role as being one of helping families resolve their own disputes:

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138 The mediators' practices and their opinions about the scope of issues that should be handled in mediation are discussed in Chapter 7.

> What we see as the purpose of mediation is to help them arrive at some sort of solution or some resolution about managing things in a way that suites them rather than having it imposed by the courts. (conciliator)
>
> We are into dispute resolution at the moment ... At the moment when we only have one or two sessions, it [therapy] isn't feasible and neither is it right that we should do so and neither are we trained to do so. (conciliator)

Others concentrated on giving children a voice in the decision making process:

> [*What do you see as your role in the mediation process?*] To act as a go-between the couple and to help the children if they are of the right age, to express their feelings . . and what they want to do about it, what they want to happen rather than having someone else always act for them, to allow them their say. (conciliator)
>
> [*What do you see as your role in mediation?*] to inform children about what is going on and to provide a platform for children to express their views. (conciliator)[139]

and still others on assisting with emotional or relationship problems:

> One is helping the parents to continue being parents but also to survive alone as a person. (conciliator)
>
> I suppose I see conciliation as more about the emotional issues than about actually coming to terms with the financial and property issues. Then they can go away and get legal advice on the other sort of issues. (conciliator)

Many of the MGFM mediators worked on the premise that many of their disputants would only use one session of one and one-half to three hours' duration. Others were inclined to spread the service over a number of sessions:

> Here again there is not set thing at all. Here again, I think we differ ... Some believe in one offs: if you can't do anything in one session, you aren't going to do anything anyway. Personally I believe that it could be three. (conciliator)

Except in cases of emergency or by accident, the mediators worked in pairs. Most followed a model similar to that developed by the Bromley service: (Service #5) a joint explanation of the process and the agency's rules, followed by seeing the parents separately for ten to fifteen minutes, and then reconvening for a joint meeting starting with each mediator reporting what one of the disputants had said during the individual

139 Mediators were never limited to one answer. This mediator is also quoted in the 'assisting with emotional and relationship issues' category which follows directly.

part of the session. Unlike the Bromley service, however, both mediators were female and the mediators separated, one with each disputant during the individual part of the process. MGFM informed the disputants at the beginning of the process, that all issues raised in the individual sessions would be shared during the reconvened joint meeting.

Not all of the mediators saw disputants separately, however:

> [*Do you see the parents separately at first?*] We can. It depends on how we feel on the day. [*So sometimes you go into a joint session with no separation?*] Yes. (conciliator)

> I personally like to see the couple together at first and then to stay together because I've found it a bit disastrous in the past when we separated and we've gone off for fifteen minutes each and then we've joined up and we really spoke for them. (conciliator) [140]

The placement of children in the process also varied from family to family and from mediator to mediator. Most mediators were content to let the parents decide if they wanted their children involved:

> I ask the secretary to ask the parents if they want to bring the children. If they do, that's fine. Some say, "No, we will come along . ." and so we see them and that is OK. We haven't any set plans on it. (conciliator)

Some suggested to the parents that the children should be involved in certain cases:

> It is left up to them. Sometimes, if the mother is saying the children don't want to see him, we may suggest that perhaps she might want to bring the children next time. (conciliator)

Others were more insistent:

> My views are fairly unorthodox. I do not believe conciliation is purely negotiation between the parents. I think the children must be included. Not to make decisions but so that their views are known. No child is ever too young to be included. (conciliator)

If children were included some mediators said they did not include them during the first session or part of the session with the parents:

> It would be unlikely that they would be in the session. What we usually do is see the whole family together [if the parents bring them to the first session] and explain that we are trying to help mummy and daddy sort out access and that what we are going to do is to talk to mummy and

140 This is one of the dangers of the mediators separating and seeing each disputant alone during the mediation process. See also Service #6.

> daddy first and then, "if it is OK with them and you then we will come and talk to you and we will be in the next room and you can play with the toys." (conciliator)
>
> We would not see the children on the first interview ... [Perhaps] after speaking to them [the parents] for some time . . but never at first. If they bring them, we ask them to wait outside. (conciliator)

Others said they included children with the parents from the beginning of the process:

> I prefer to have the children there but I do think there are some areas that are the parents' business. [*So would you include them later on?*] No, not necessarily, I am quite happy to start with the children but if you identify areas that the parents want to discuss further that should at least be an option. [*So you would exclude the children then?*] or offer another session without the children there. (conciliator)

Some of the mediators normally only saw the children in the presence of their parents, others saw them separately from the parents and then brought them into the meeting with the parents to discuss their concerns.[141] Other mediators reported the children's concerns to the parents without the attendance of the children. If the children were seen separately from their parents, they might be seen together as a group or individually, depending on the ages of the children and the circumstances of the case.

MGFM members also mentioned the need to occasionally include people from outside the immediate nuclear family in mediation sessions:

> It is thinking on your feet and dealing with the people you come across. If there is a mother-in-law or father-in-law or friend in the waiting room, you will have to check out what is going on. With different cultural groups, it may be that person is very important to them. Some may bring their religious leader along. [Some] Muslims may not make a decision without their Imam . . so it may be important that he come along to the session. You have to look at what the situation is and how you can work with it so you can't lay down a rigid pattern and say this is the way we work. (conciliator)
>
> Yes, the step partner. They should always be invited in. I've done it with the partners sitting outside in the waiting room and just the original parents and one parent's partner disagreed and that was that. There are different ways you could do it. You could have the parents in first and then invite the couple in. (conciliator)

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141 This is the model most of the in-court mediators used. See Services # 1, 2, 3, 4, and 15. For a discussion of Greater London's mediators views about the inclusion of children in mediation, see chapter 5.

This service, like the other mediation services in Greater London, was prepared to break confidentiality if child abuse or potential harm to an individual were to be uncovered during the discussions. Mediators first encouraged the parents or one of them to report the information to the appropriate agency and offered their assistance with this, and as a last resort, said they would report it themselves. Some mediators chose to deal with this issue if and when it arose, others chose to issue preliminary cautions:

> I feel it is very important to tell people beforehand the basis on which they come and what you are actually going to do because I think you can fall down very badly if you don't ... You've got to warn people that if there are threats to children or to anyone's life that these must be taken seriously and if in our view they were serious, we may have to disclose them. (conciliator)

Any agreements reached in MGFM session were often typed or written and signed by all the participants and copies were given to the disputants and to the mediators:

> Personally I believe it should always be written down so there can be no misunderstanding. They don't have to keep it. That is their prerogative but I think the agreement should always be written down and the names of the mediators put on and they sign it. . . so there can be no misunderstanding about what was agreed. (conciliator)

> Yes, we have a voluntary agreement we write down that they can sign, that they can take away to remind them about their agreement. (conciliator)

Other mediators did not reduce their agreements to writing:

> I don't write it down as yet ... It is more just a verbal thing. (conciliator)

> If they like, we write it down. If they don't want to, we don't. (conciliator)

When I contacted MGFM again in the summer of 1988, one mediator had left the service and two more had joined. The service had also received some funding for education and training of its mediators. The service was planning two training workshops in the fall. Two mediators had been designated supervisors to oversee the work of the other mediators in the agency. The service as a whole was still having

problems with funding. The only other change of significance was that Marriage Guidance had changed its' name to 'Relate'.

This service was not connected to probation or court-welfare services and so did not write welfare reports for the courts.

Service #10: Newham Family Conciliation Service[142]

We turn now to another out-of-court service, the Newham Family Conciliation Service (Newham). Newham was the joint effort of a local Family Welfare Association (FWA) and the North-East London probation service.[143] The probation service provided an officer one-half day a week to co-ordinate the service and FWA was to provide supervision and training. The service was not affiliated to NFCC, although it did have a cross-disciplinary management committee.

Clients were not asked to pay for this service and the mediators worked on a volunteer basis after normal working hours. Referrals to the agency came from solicitors, probation officers and some clients came to the service after seeing posters at the Citizens' Advice Bureau. Newham did not have many referrals directly from the courts. By 1987 the service was only handling about a dozen cases a year because of funding and organizational problems:

> We are handling no more than a dozen clients per year, perhaps not even that. We get a lot more enquires. . . The number of referrals dropped off over the two years I was doing it because I didn't publicize the service because I was getting this feedback from the conciliators that they didn't feel adequately trained.

The mediators in this service had probation, social work or Marriage Guidance backgrounds. The Newham service could be reached during regular office hours by phoning the coordinator at his probation office. Appointments were normally made after working hours and were held in either the probation or FWA offices.

142 The information which follows was given to me during an in-depth interview with the coordinator of the service.

143 This should not be mistaken for the North East London Court-Welfare service to be discussed in the next section.

Newham limited itself to child custody and access issues. It provided no mediation of property and financial disputes and did not provide individual counselling:

> What we did was to be very specific about what we set out to do which was purely to conciliate between couples regarding their children: custody, access and their general welfare. We didn't get into property and financial matters and we didn't get into providing supervised access. . . I thought we should provide a counselling service if one party is willing to conciliate and the other isn't. . .[but] FWA were very much against that. They said it was their territory.

The service offered a dispute-resolution form of mediation rather than a therapeutic one:

> We used a negotiation model more than getting involved in the family dynamics. . . I think it [conciliation] is dispute resolution. You are doing it over a limited time and you are keeping them to task and focussing on the children. If you want to get into the therapeutic side then you refer on. That is the way we ran it.

Newham used two mediators: one male and one female, wherever possible. The service occasionally included children in the mediation sessions but only if the conflict levels between the parents were not too high. Like all the other out-of-court mediations services, this one also terminated mediation if it became apparent a child was being placed at risk. Agreements were sometimes written down but were often kept informal:

> They were left informally. Some conciliators did write it down but it was always left on the basis that, "now you have an agreement, lets see how it works. If it doesn't work, the come back and we'll renegotiate it."

When I first contacted this service in February of 1987, it was struggling to stay in existence:

> The FWA has come under major funding cuts, also the Newham local authority. That means axing non statutory services. We had to cut down. We had no funding available for training. We tried to get free training and we couldn't find it. My job is to co-ordinate. I was getting strong feedback from the conciliators that they didn't fell trained enough to do the job. They were feeling lost. FWA gradually withdrew, in October of last year. We are now looking at whether we are going independent. We need to fund raise. We are trying. . to set up a management or steering committee, people with time, energy, interest or money. . . We don't need a vast amount of money, 1,000 per year, because my time is still there as coordinator but we do need money for training.

By the fall of 1987, Newham was no longer in existence.

Service #11: Solicitors In Mediation (SIM)[144]

We turn now to an independent out-of-court mediation service which, in 1987, was unique in that it employed solicitors teamed with an experienced social-work mediator. Solicitors In Mediation (SIM) was established as a pilot project to look at the benefits and problems associated with solicitor and mental health co-mediation of all areas of dispute. Because SIM mediators were in the process of developing a new mediation model, not all of the processes described in this section were firmly established. Some were experimental only, others, particularly those with respect to children, were only proposed.

SIM began to accept clients in 1986. In 1987 the service was composed of one social-worker and five practising solicitors. Prior to offering mediation, all of the solicitors had taken preparatory mediation training from the former training officer of NFCC. All of the solicitors were practising lawyers. This, combined with the fact that SIM's model called for all five solicitors to co-mediate each case with the one experienced mental-health professional, meant that initially SIM was forced to limit its' intake of clients.

Clients were being referred to SIM by Citizen's Advice Bureaus, by solicitors, and some people were referring themselves after reading media reports about the service. During the pilot stage of this service, mediation clients were being charged 30 per session to cover the cost of the mental-health professional's travelling expenses. The solicitors involved were devoting their time free of charge. In 1987 SIM had not yet developed, but was working on, the development of a feasible fee structure for it's

144 Except where otherwise noted, the information which follows was taken from interviews with the five solicitors and the psychiatric social-worker who provided this service. SIM was contacted again in the summer of 1988 to update 1987 information.

cross-disciplinary model. One of the mediators described the magnitude of the problem to me as follows:

> Most solicitors in Greater London charge between 75 and 100 per hour. Conciliators always charge less. The costing of it is very difficult. If one uses one's own offices, does that come into the cost? So charging is something we have to look at. If you are going to be charging then it is only open to people who have money. ... From my point of view that is not fair. So then we have to look at whether we can get it covered by legal aid. ... A great many solicitors will not do legal aid. You've then got a split in the lawyers. Lawyers will say, "I do the private cases but I won't do the legal aid." There are a myriad of problems. (mediator)

By 1990 practitioners using this model were charging each disputant 60.00 per hour.[145]

During 1987 and 1988 SIM was developing and experimenting with different styles of co-working. The mediators described some of the methods they were looking at as follows:

> Solicitors In Mediation has been set up to provide a total package. That is why we have [the social worker] there, for her to deal with any counselling that needs to be done or any discussions over the children and the lawyer is there really to provide information on finances, what the courts are likely to do, what should they be thinking about, inform them there should be full disclosure, getting the full disclosure together, and then saying to them: "what sort of settlement do you have in mind? Where are you both going to live? How much is it going to cost? How much do we have in the kitty to provide for this? Are we going to need maintenance? (mediator)

> Some people see co-mediation as two professions with complementary knowledge and skills coming together and doing a double act and alternatively with one doing one bit and one doing another. I think we are moving beyond that and seeing it as a process we are jointly involved in throughout and we will be developing strategies in which one of us may lead in different parts: one sitting back while the other does that bit, but we are still working together. There are different ways one can pose a question . . or balance it. (mediator)

Preliminary SIM documents, for example their 1986 Proposal to the Law Society, made many references to the solicitors advising clients during the mediation sessions. With further experience, SIM mediators increasingly saw this role as inappropriate:

> The solicitors in mediation are not advising. We were initially worried about that. (mediator)

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145 L. Parkinson (1990b).

> The role of the solicitor, the lawyer, [in mediation] is not that of the legal advisor. ... The role of the lawyer is as a neutral mediator using his legal background and that is a very different role. (mediator) [146]

Couples needing assistance were almost invariably seen together. SIM did not normally use separate sessions at any stage in the mediation process. In 1987 most mediation sessions were being held in the solicitors' offices. First the ground rules of the mediation service were explained:

> They would already have received from us a leaflet outlining what Solicitors In Mediation does . . When we meet we explain what out ground rules are. . . We take great care to ensure that the couple understand fully what is involved and what they can and cannot do: that for example, they can't speak to either of us on the telephone and expect us not to report back what was said. We explain that the financial disclosure information document is not treated as confidential and either party can refer that to their own solicitors or the court in due course, but that the discussions themselves are [confidential]. We also explain that if evidence of child abuse came up that might be a circumstance where our duty might be to the child and not to the couple, so they are told that at the beginning as well. (mediator)

The mediators avoided communicating with either party alone outside of mediation sessions:

> We make it an article of faith that we wouldn't have any discussions with one without the other being fully aware of the contents so all telephone calls must be limited to logistics only. There will have been no discussions of substance at all between sessions. (mediator)

The mediators insisted that all information and documents to be used in the sessions were shared with all participants:

> If the parties are to bring documents, we ask that copies be made for everyone. Even if they say that they are their own notes and will read from them. We even insist that any documents being used are available to everyone. It helps with the power balance. (mediator)

The agency was careful to point out that no confidentiality attached to factual information disclosed during the sessions, particularly to financial disclosures; that confidentiality was limited to offers and other, non factual information:

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146 For an excellent discussion of the role of the lawyer in mediation, see: J. Ryan (1986). See also: L. Gold (1984): 27; A. Pirie (1985): 378; L. Riskin (1985): 329; A. Shepherd, M. Philbrick, D. W. Rabino (1983-4): 616; L. Silberman (1988): 359; J. Wiseman and J. Fiske (November 1980): 442.

> We take the view that you can't have confidential disclosure. If it is disclosure, it is disclosure. . . You can't pretend that Mr. Bloggs hasn't said he earns $20,000 if he has said that in mediation. [Or] if it is quite important to know if Mrs. Bloggs is living with Mr. Smith and she says quite clearly in mediation that she isn't, then again, it is very difficult to consider that privileged. Either she is or she isn't so she has to include that as a material fact. (mediator).[147]

Solicitors In Mediation, *Proposal to the Law Society* (1986), made it clear from the beginning that there was to be no confidentiality for documents or for evidence of value and income. These SIM intended to give to the disputants' solicitors. Global mediation services cannot offer unqualified confidentiality with respect to information discoverable within the adversarial process, which one or the other disputant has a legal duty to disclose, in any event. If mediation services could do so, disputants could prevent the introduction of evidence at trial by first disclosing the information during a mediation session.[148] The problem with SIM's approach is that it is likely many disputants would not understand what is confidential and what is not. The advantage is that considerable time and money can be saved by making this information automatically available to the lawyers reviewing the mediated agreements or litigating the case.

The other SIM limitation to confidentiality was with respect to threats or allegations of child and other abuse:

> I also say if in exceptional circumstances someone's safety or if someone was at risk, then we might not be able to preserve confidentiality and we then expect to talk about that with the couple concerned. (mediator)

After laying out the SIM ground rules and gaining client endorsement of the process, disputants were invited to discuss their concerns, what they hoped to accomplish in the mediation process, and to prioritize the issues to be discussed:

> I would then [after discussing the ground rules] start from what they had identified and then . . see if there are other issues that they haven't identified; what stage they are in the process of separating and divorcing. . . Then we deal with some of the immediate issues. . . [We are]

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147 For further discussion of the limits of confidentiality and privilege in divorce mediation, see chapter 13 and: Folberg (1988); C. M. Huddart (1991): 85-93; G. Kirkpatrick (1985): 85; J. McCrory (1988): 442; H. McIsaac (1987): 69; M. Roberts (1988): 96-7; Howard (aka) Kaufman v Drapkin (1991): 172-194; B v M (1990): 346-348.

148 J. Folberg (1988): 328.

> negotiating an agenda for the first session and maybe the second one as well: "we will do such and such today and leave such and such for the next time we meet. . . How does this seem to you?". . . We try to do that in the initial stage: negotiate an agenda. (mediator)
>
> She asks, "What do you hope to achieve by coming here?" and that opens up the whole picture. We don't say, "Well now we are going to deal with the children; we are now going to deal with property". It flows from their starting off and by saying, "What do you see as hopefully coming out of this?". (mediator)

Normally the disputants were seen together throughout the process. The service was prepared to include children in mediation sessions on agreement of the parents but, with the exception of a teenage child who was seen separately with the parents' consent and at the child's insistence, they had not yet done so.[149] By the summer of 1988 SIM was offering to include children in the mediation process in the following circumstances:

> We are offering to include children in the discussions, on agreement. We don't rule out the possibility of seeing them alone but only subject to contract. We prefer to see them in a family meeting, more likely at the end. We may separate them to find out if there is something they want the conciliator to say or to help the parents in their communication about the separation. Whether we would use a side session would depend on age and circumstances. [We would use side sessions] for support, [giving them an] explanation of the process [but] not to give them power of choice but to let them know of the importance of their point of view. (global mediator)

SIM mediators had found that the issues to be discussed in the mediation sessions were usually connected. Generally, however, depending of the sequence of priorities established by the disputants, sessions moved from discussions concerning the relationship between the parties and their stage in the emotional divorce process, to discussions concerning the arrangements to be made for the children, to discussions about the distribution of the disputants' property and income.

Financial information was, therefore, not usually requested in the initial stages of the mediation process:

> In one of them there wasn't a decision to separate yet so you can't say, "Let's see what you've each got. It would be totally inappropriate so the

149 Many adolescent children expect to be consulted during the planning of arrangements which concern them: C. Springer and J. Wallerstein, (1983): 15; Y. Walczak (1986); J. Wallerstein and J. Kelly (1983).

> framework for discussion was, "Let's see what you each want to do. Let's project what might happen. Is that an acceptable way?" It was only by the third meeting that they were sufficiently clear about their own future that they wanted to talk about the money. (mediator)
>
> We are not telling them what to bring because we think that might be a bit offputting. So we are waiting until they come and seeing what stage they are at and deciding with them what sort of supporting documents we need and what sort of factual evidence and then setting them kind of homework for the next session: "What we propose is in the next session dealing with such and such" and then listing the things that we need and then going through it, making sure that they are both perfectly happy with that and with having these documents photocopied and a copy given to each, having explained to them at the beginning what these documents are, that they won't be bound by privilege. (mediator)

SIM was a voluntary, non-investigative service. It had, therefore, no power to investigate or to verify information given by the disputants. For this reason SIM was careful to disclaim any responsibility for investigating financial circumstances or for verifying the information given to it. If, however, during the process the mediators became convinced that one of the disputants was not providing full disclosure or was negotiating in bad faith, SIM was quite prepared to terminate the process:

> I know . . .[sometimes] the wife has no idea and sometimes the husband isn't too keen. We would have to stop the sessions because the whole point of Solicitors In Mediation - it is based on trust between the two and an assumption they will be totally honest about the financial picture. They can't possibly make an agreement unless there is full disclosure. (global mediator)

In 1987 and into 1988 SIM mediators were not all using the same methods to obtain financial and property disclosures. Some of the mediators hoped to develop and use a comprehensive disclosure list of assets and liabilities:

> I didn't actually give them a printed list [of documents needed] and I think at some stage we should. I am very keen to move to something more formal. I think John Haynes has an exhaustive list. We don't do that. I would like to see that happen. (global mediator)

Others preferred to isolate the documents needed on a case by case basis:

> People's finances vary so enormously it is more helpful to listen to what assets they have and then to advise them as to what they need to produce rather than a comprehensive, pro forma list in every case. If you attempt

> that, you end up with pages and pages of stuff, 80% of which is not relevant. (global mediator)[150]

Recent reports from the Family Mediators' Association (FMA), a national association of mediators who have adopted SIM's mediation model, indicate that practitioners using this model are now stressing the importance of full, comprehensive disclosure prior to settlement discussions.[151]

SIM actively encouraged its disputants to retain independent solicitors throughout, not only at the end, of the mediation process:

> [*Do you insist that they have independent solicitors?*] We are in no position to insist but we advise very strongly, certainly at the conclusion of the mediation sessions, but also during the course of the mediation. (mediator)

> Mediation is not an alternative to legal advice. It is an alternative to litigation. . .[*Are most represented by their own lawyers?*] If they don't [have solicitors] when they come, we certainly try to ensure that they do. I don't think we would be at all happy, . . . If someone actually refused and said, "I'm not prepared to", we would still write up the [heads of] agreement, saying it was subject to legal advise and they would be strongly advised to obtain legal advice. (mediator)

SIM was dealing with a broader range of issues than were most of the other mediation services in Greater London. Consequently the mediation process was longer. Mediation was rarely completed in fewer than four, one to one-and-one-half hour sessions and the mediators were finding the process could take as many as ten sessions:

> So it can take 5, 8, 10 sessions. The last one could take ten sessions but it is a complicated case and were it to be dealt with in litigation, that case could take two or three years easily. (mediator)[152]

In 1987/1988 SIM was still in the process of developing an agreement process. It was expected that the mediators would not normally draft complete, formal agreements but would instead list the areas of agreement. These would then given to the parties to take to their solicitors with the disclosure statements for final drafting of

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150 The wording being used here: 'advised' 'need to produce'; is very similar to that used in the adversarial process. Hopefully this reflects only the use of old terminology and not speaker's view of mediation.

151 L. Parkinson (1990b).

152 The number of sessions is not unusual for global mediation services. For additional comments see Service #6.

the agreements. The mediators described for me some of the approaches they were using:

> First you have to have the disclosure statement for each side and then you draft a document, which for want of a better word, I call the heads of agreement. Now the preparation of that and the mechanics of how it is done is very much at the experimental stage. (mediator)

> What we say is because the solicitor in the scheme is not able to give either of them advise, each party should go and see a solicitor of his and her own choice, explain the situation and obtain expert legal advice before signing away possible rights they may have. . [*Do you draft the agreement or do you indicate it in outline?*] We indicate it in outline. The final drafting for the court will be done by the party's respective solicitors. (mediator)

> What we are doing increasingly now are interim agreements. . . We summarize: A) this is what has been agreed, B) this is what is proposed and what may be acceptable to them both, C) these are the areas unresolved and needing further discussion.

This agency has now expanded and reorganized. The originators of SIM were instrumental in the formation of the Family Mediators Association (FMA). Members of FMA are committed to providing the global, lawyer/mental-health cross-professional, mediation model originally developed by SIM. FMA now sponsors a five day mediation training programme to train lawyers and mental-health professionals to work together to provide global mediation services.[153]

SIM was an independent agency which had no connection to the courts. It did not, therefore, provide in-court mediation and none of its mediators wrote court-welfare reports.

Service #12: the London Divorce Mediation Agency[154]

The last out-of-court, dispute-resolution based service to be discussed is the London Divorce Mediation Agency. The London Divorce Mediation Agency (LDMA) started to

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153 'Success Story', Family Law 19 (1989): 456-467; F. White (1990): 51.

154 Information has been taken from two interviews with one of LDMA's three mediators and from leaflets distributed by the service.

offer mediation in 1987.[155] By the summer of 1988 the service had still mediated only a few cases. Consequently we shall not be examining this service in detail.

All three of LDMA's mediators taught part of a twenty-two week course in mediation at the Polytechnic of North London.[156] The service was provided by a law teacher, a court-welfare officer and a social-work teacher/family therapist, all of whom were female. The mediators worked in pairs and used their own homes for appointments. Families were being charged 40 per session. The service intended to:

> help couples reach partial or total agreements in the following areas: (a) whether the relationship has irretrievably broken down; (b) access, care and control and custody of children.[157]

LDMA also intended to offer families assistance with their financial disputes if those were closely connected to disputes about the children.

LDMA intended to use the mediation model most commonly used by mediators in Marriage Guidance's Mediation Service (Service #9:

> We see them together and the two conciliators explain to them how we work. . . Then each of us will see one member [one disputant] and if there are children, the children; for about ten minutes each and we will get all the relevant information on how each of them see the problem. Then we will see them together and each conciliator will feed back what was said and from then on, we will start the negotiation process. One conciliator sees each person. (conciliator)

When I contacted the service again in the summer of 1988, they had still not completed many cases but had applied for associate membership in the National Family Conciliation Council (NFCC). The service was still not listed as an affiliated service in the December 1989, National Family Conciliation Council, Newsletter but was advertising its services in the March 1990 issue of *Family Law*.

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155 The three mediators involved had all been interviewed in their capacities as mediators working in other Greater London mediation services. Because the mediation experiences upon which this group of mediators based their opinions was from the other services, only a sketch of the service is provided.

156 Polytechnic of North London, Conciliation (1986). The course was first offered in October of 1986.

157 This quote was taken from a letter circulated by the agency to members of the Solicitors' Family Law Association.

This completes our examination of the out-of-court dispute-resolution based mediation services. It is clear that there was far less room for coercion and pressure if mediators used these models than if they used the in-court mediation models. In the next two sections we discuss mediation services in Greater London which included elements of family therapy. The first three services to be discussed were in a state of transition. While they offered families dispute-resolution assistance, they incorporated elements, or were moving towards the incorporation of elements, of family therapy. We end our description of Greater London mediation services with a look at two therapeutic mediation services. We shall find that these services had different goals and used different methods from the other mediation services. While the differences between the in-court and the out-of-court mediation services were of degree: the in-court models allowed less time and were more coercive and directive; the differences between the dispute-resolution and the therapeutic services were of kind as well as degree. The services, and the education and training one would need to provide them, were substantially different.

Section 3: Mixed Dispute-Resolution and Therapeutic Mediation Services in Greater London

Service #13: the Inner London Probation and After-Care Mediation Service at Highbury Corner[158]

The Inner London Probation and After-Care Mediation Service at Highbury Corner (Highbury) was staffed and administered by a probation unit. The service operated primarily out-of-court but provided some, limited, on the spot, in-court 'mediation'. The Inner London Probation and After-Care unit at Highbury Corner was a non specialized probation unit and part of the Inner London Probation Service. The latter included the specialized Central Court-Welfare Unit at the Royal Courts of Justice (Service #2) and the specialized court-welfare unit operating the Family Courts Service on Balham High Road (Service #16).

Three interested female probation officers from the Highbury unit began offering mediation in August of 1985. Mediation was offered as a separate, distinct service. The Highbury mediation service was officially recognized within the probation service, appearing in the service's 1985 survey of mediation services in England.[159] Although the officers worked in the criminal as well as in the domestic field, they offered mediation to only their family law clients. Highbury's three mediators estimated that one-third of their probation clients wanted help with family law matters and two-thirds help in the criminal-law field. This is a weightier family-law case load than that carried by most probation officers working in London.

The Inner London Probation and After-Care Service at Highbury Corner provided assistance to the Highbury Magistrates' Court which, in 1987, held domestic proceedings every Wednesday and one Tuesday per month exclusive of emergency cases. The service had an officer in attendance in the court room on these days to provide

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158 The following information was taken from in-depth interviews with the three probation officers who provided this service, attendance at the premises used by this service for its mediation sessions, and one days' attendance at Highbury Magistrates' Court during domestic proceedings.

159 Inner London Probation Service (1987).

assistance to clients and to the bench, to process requests for welfare reports and to initiate mediation.

Most mediation sessions were scheduled on an appointment basis off the court premises in the unit's probation office but the officers occasionally mediated minor disputes on court premises:

> [*Do you do mediation sessions on the court premises?*] Not often but it has [happened] for a quick one where it looks very simple, where there has been a misunderstanding say, because of the adversarial system or the lawyers concerned. You might explain things and get agreement by just clarifying [the issues]. We usually use our appointment there to persuade them to try conciliation and to have appointments with us here [in our offices]. (probation officer)

The Probation Service and Highbury Magistrates' Court occupied opposite ends of a large, modern building. On the day I attended family law proceedings in this court, the proceedings were being held in a small court room upstairs in the court building. As one approached the court room, there was a door leading off to the right. This room was used by the probation officer when they had private talks with disputants. The room was small, but private and reasonably pleasant.

During the domestic proceedings, if it appeared to the Magistrates that the parties might benefit from discussions with a probation officer, the Magistrates adjourned the case for that purpose. The disputants (minus any legal advisors) were then taken by the probation officer to the private room for a private discussion. I attended several of these. In all cases these discussions were used to explain the goals of mediation, to see if the disputants were in favour of trying the process, and to schedule mediation appointments at the probation offices if the clients were agreeable. When the parties agreed to attend mediation, the court was informed and a further adjournment was granted when this was appropriate:

> If it is a case for conciliation, it is adjourned sine die and it is up to the parties themselves to get the case back into the list if things break down. (probation officer)

Most of the service's mediation clients came from Highbury Magistrates' Court. Referrals for mediation were made during court proceedings, as described; or earlier, when applications to the court were first filed. Highbury also had a few families using mediation who were not involved with the court. These families come to the service directly or were referred by solicitors or by social services. The backgrounds of Highbury's mediation clients were diverse:

> We have Chinese, West Indian, North African, Turkish Cypriots - the whole range. It has not created problems, surprisingly not ... [They are] mostly working class and increasingly [some] middle class, though middle class people tend to go to the County Court. (probation officer)

The waiting area in the probation service's offices was large, open and in full view of the probation service's support staff. The room set aside for mediation was long and narrow, informal, somewhat dark, and contained many toys for children. Mediation appointments were scheduled by Highbury officers to suite the convenience of the disputants. Evening appointments were available for those who had trouble getting to the service during the day.

The Highbury service mediated types of family disputes not normally encountered by the other services, largely because Highbury was assisting people with their family law problems very early in the separation process. The service did not mediate property disputes but did mediate minor financial disputes, on an informal basis, when these were child related:

> We certainly find that we are often dealing with relationships which haven't irretrievably broken down. We are dealing with situations where they have just separated, maybe for four weeks whereas in the County Court it is often cases where they have been separated for sometime ... We even conciliate problems occurring within the marriage even where they haven't separated. They [the clients' problems] range across the board. It can be about money, perceptions of power, disturbances in the child, disputes over child rearing practices, . . also alcoholism, drugs, employment. [*Do you handle financial and property matters?*] No. We can if it crops up. As part of the conciliation process we might help them with that. Maintenance for example, if he says, "I will give her so much" and she says, "I need some more because of clothes" and he says, "Well, I'll give you 10": we do in that sense but not property and neither formally. It may flow from the custody and access ... the chap who

> wants access because he is paying maintenance. They [the disputants] tend to tie them together. (probation officer)

Most of the service's cases, however, involved disputes over access to the children.

Most of the probation and court-welfare officer mediators in Greater London said their ultimate goal was trying to get parents to exercise responsibility for their children. This service was no exception:

> What we are trying to do is to shift responsibility. We are trying to shift responsibility back onto them as parents - away from the courts - in the sense that "It is your children. It is your responsibility. You remain the parents." Even if they have differences they can understand that. It is reassuring to them to know that they still do have power over their lives. (probation officer)

Highbury provided what was primarily a dispute resolution service:

> [The following was taken from a discussion with two probation officers. A different speaker will be identified by a change in number.] 1: We are trying to find some kind of workable agreement. 2: It is trying to keep the focus on the here and now. There are a lot of hidden agendas going around and you could go on for hours in the "remember when" ... Maybe what you are doing is establishing boundaries and containment. 1: Yes, clarification of issues to try to find out if there is any measure of agreement and to demonstrate to them what the gap is and leave it to them to decide whether that can be bridged with help or not. 2: It is looking at issues and saying this is the gap and this is the area where we've got to move. (two probation officers);

> Some people are very good at it. Some people simply cannot negotiate and they need to be taught how to do that . . because that is really what conciliation boils down to, is finding a way whereby couples can perceive how they can negotiate. That is really what you are trying to do is trying to teach them how to negotiate. (probation officer);

but one which contained aspects of counselling or therapy when the situation was seen to warrant them:

> You can do that [refer disputants who need extra assistance to another service for counselling or therapy] assuming they are willing to go which a lot of times they are not ... They are going to perceive, quite rightly, that you are singling them out. So it has to be done so tactfully and carefully so they don't devalue you. It would be helpful if they had their own therapist ... It also depends on facilities. If it is available it is a better model. And also if it is free because a lot of people can't afford to go to expensive therapy ... If that is not possible then maybe you have to do it yourself. That is the next best thing. We might see them both individually then to give each their own time. (probation officer)

> They both [dispute resolution and therapeutic mediation models] have their functions in a different context. Some people know themselves very well . . and in that case you are really just dealing with the dispute resolution. If it isn't that then you really have more work to do - to fill in the gaps and then you do need a therapeutic model as well. It depends of the people and where they are. (probation officer)

This was one of the few mediation services in Greater London that would mediate cases involving child and spousal violence and abuse. The service was only prepared to do so, however, when some method of protecting the abused person could be devised. Highbury mediators were prepared to breach confidentiality when this appeared to be the only means of protecting family members from abuse. The service did not give preliminary warnings to disputants about this, preferring instead to deal with each case as it arose.[160]

Highbury's mediators usually worked in pairs and almost always started mediation sessions with the two parents together. The first part of this meeting was used to:

> check out why we are there - what we can offer them and then getting them to explain the situation as they see it. (probation officer)

Thereafter the mediators could not identify any one approach that they would use in all cases:

> Which approach depends on - You get a feel very quickly for where they are and they will lead you to a large extent into the methodology: how they use language, how they see their problem ... They may be in different stages [of separation] ... and with some, it is quite clear that the blocks in sorting out the arrangements about the children is the fact of the continuing emotional involvement so you have to deal with that. We don't do long term work with emotional problems but we have to deal with the fact that is what is in the way. (probation officer)

> [*Do you continue with them all together?*] No, we may change it around a bit: see the children on their own, see the parents on their own or we may leave them alone if there is something they want to talk about, if they can do that. (probation officer)

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160 If mediators are to avoid misunderstandings and professional misconduct claims, it is preferrable that they outline the parameters of confidentiality and privilege at the beginning of mediation sessions: G. Hufnagle (1989): 33.

The process with respect to the children also varied according to circumstances, but children of all ages, from babies to seventeen year olds, were usually included at some stage in the mediation process and usually at some point with the parents. Again, the mediators indicated that their practices changed with the circumstances:

> I prefer to have them in from the beginning whatever the age but we tend to follow the parents' wishes on that. Often parents are frightened, particularly if they haven't met for some time ... We usually have them all together at some stage. It varies so much. We will also often see the children on their own and feed back to the parents what has come out of that ... but we invite the children initially and it is the parents who decide whether or not to bring them. (probation officer)

> Here we usually allow the parents to let off steam in the first couple of meetings and it isn't perhaps healthy for the children to experience that, not with two strangers sitting in. That is not to say they haven't heard it all before - they have ... It is easier at the end where there is some measure of resolution and agreement. It isn't always possible though for practical reasons and it is often that they will come in at the beginning and see the conciliation process work. It depends on the degree of difference between the parties. If they are very far apart, we will ask them [the children] if they wish [to have] a respite from sitting in ... It also depends on the pattern in the family: whether there has been a free flow or whether, as in some families, they have tried to keep their disputes from the children. (probation officer)

The mediators reported frequently seeing children separately from their parents, particularly when the officers had concerns for their welfare or when it appeared that one of the parents was exerting pressure upon them. Normally at the end of these separate sessions the officers reconvened with the parents (with or without the children, depending on circumstances) and introduced to the parents the information gained from the children:

> [*Do you feed back to the session what the children have said?*] Yes, we do but we try as far as possible to accent the positive and not necessarily - if there are things to be said, restate it perhaps somewhat differently and don't do it like it is coming directly from them. We say, "It seems to us that.." We shelter them: "It seems to us, this is what they are trying to say". (probation officer)

This practice is advisable. When we examine child involvement in mediation in greater detail in chapter 5, we shall find that the issue was controversial. We shall also find

that, when mediators or children confronted mediating parents directly with children's concerns, the results were sometimes disastrous.[161]

Highbury used temporary agreements extensively:

> I have found it helpful as a way of working to have a session and set up one access - only to try to set up one access - rather than immediately trying to set up how it will work indefinitely, for people who are really stuck to get them to agree to one [access visit] and come back and tell us how it went and what all the problems were and to some of them, you do this two or three times and the objections start to break down. (probation officer)

Records of the agreements were kept informally:

> We may note it in case they come back and say we can't remember what we agree. We might write them a letter to say: "You've agreed to see Jane Tuesday at six", for example. We do go over it several times and it is amazing sometimes how they don't hear. Whether or not they turn it into an order is up to them. (probation officer)

> We clarify with the parents to ensure they fully understand. It is up to them what they want to do with their agreement ... It is not written down unless they need to because of difficulty remembering. Most leave it as an oral agreement though some ask to have it written and we comply with their request. If it is written, it is not signed. It is usually in the form of notes or a letter.

Mediation sessions lasted between one and one and one-half hours each, and families might have between one and six sessions. The officers found that most of their mediation cases were completed in three or four sessions and estimated that 80% of their cases resulted in some sort of workable agreement.

With the exception of violence or abuse, previously mentioned, this service maintained confidentiality in mediation. Normally the content of the sessions was not reported to the court or to the solicitors.[162] If the officers conducted mediation with a family and the unit was subsequently faced with a request for a welfare report on the same family, the enquiry was done by an officer who had not participated in mediation.

When I contacted this service again in the summer of 1988, they were continuing to work in the same way but their family work had decreased and their

161 See chapter 5.

162 The mediators reported occasional trouble with some magistrates who demanded disclosure.

criminal work increased. The Highbury mediation service was still in operation in December of 1989.[163]

Service #14: Mediation In Divorce[164]

We turn now to an independent, out-of-court mediation agency, located in the south-western region of Greater London. Mediation In Divorce (MID) began offering mediation to separating and divorcing families in 1983. The service's originators were probation officers but by 1987 MID had become independent of both probation/court-welfare and the courts. MID was and continues to be a full member of the National Family Conciliation Service.[165] Consequently the service had a management committee consisting of representatives from the magistrates' courts, the legal profession, probation, and various community services. MID engaged an administrator and five other mediators, all of whom worked for the service on a part-time basis. MID offices were open two and one half days per week. The service could, however, be reached at other times via its twenty-four hour answering machine. Mediation sessions could be scheduled outside of MID's normal office hours by appointment.

MID was located in a large house on a quiet residential street in East Twickenham. The house was shared with several other community services. MID's office was on the second floor and contained a reception/office area, a large hallway and several other rooms which could be used for mediation sessions or as waiting areas. The mediation rooms were small, not lavish, but comfortable and informal.

When the service was originally created it was expected that it would serve clients from the Richmond, Kingston, Sutton and Merton boroughs of Greater London, but MID did not limit mediation services to people from those areas. By 1987 the MID

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163 Personal communication from one of the officers involved.

164 Except where otherwise noted, this information is based on in-depth interviews with the administrator and the five other mediators connected to this service and on attendances at Mediation and Divorce (MID) offices. The information was updated in May of 1988.

165 NFCC, Newsletter (1989): 12.

estimated that it was mediating approximately 100 cases per year. Most of the service's clients were coming from solicitors. MID's 1986-1987 *Annual Report* showed that 65 of the 180 referrals to the service[166] during 1986 had come to the service from solicitors. The next largest group (37) came directly. Disputants were also being referred by the Citizen's Advice Bureau (22) and by Marriage Guidance (10). Of the 180 referrals, the service worked with 118 families but in only 72 of these cases did the parents participate in joint mediation sessions. The others came for information and advice only or declined the services' offer to help.[167]

Disputants, except those on supplementary benefits who were seen free of charge, were charged 5.00 per session but were encouraged to contribute more on a voluntary basis. The service received 15.00 per case for those on legal aid. Disputants were coming to this service very early in the separation/divorce process. MID mediators estimated that about 70% of the service's disputants were coming to the service before divorce decree, and that many of these were coming for help with their separation:

> Our clients needs are wider than just custody and access. We are getting them very early for help in separating, where they are still living under the same roof. We need to teach them how to talk to each other as parents rather than as a couple. (conciliator)

> Sometimes they don't have children and are looking at whether they are married or whether they are divorcing or not. (conciliator)

When the continuation of the disputants' spousal relationship appeared to be viable, and reconciliation counselling appeared warranted, MID referred people elsewhere for that service. None of Greater London's mediation services offered reconciliation counselling as part of the mediation process.

MID mediators said that they did not normally deal with financial and property issues, with the exception of the marital home when the issues involved were closely connected to disputes over the children, except upon solicitor request:

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166 Mediation In Divorce, Annual Report for 1986-1987. Many referrals do not result in the attendance of both parties.

167 The figures were taken from MID's 1986/87 annual report, ibid.

> This morning the couple I saw, they did come to talk about finances because the children had grown up so they came to talk about the house and how she could hang on and I would dearly have loved to have been working with a lawyer. (conciliator)

> I seem to be declaring firmly that we do not deal with property and financial issues and yet so often it comes up because it is so intimately bound up with other decisions people make. . so we always start off by saying, "We are not experts in this field. Please ask your solicitors and if you haven't got one, please get one quickly. . . The other time when we do deal with property, quite openly is when solicitors send people to us to save their clients money. So if they very clearly know what they have to dispose of and they've only got to sit down and decide how to do it in a fair manner and they are half way there already - it can save them quite a lot of money to do it in one or two sessions. (conciliator)

In 1987 all of the mediators working in this service were female and all had previous mental-health related occupational experience as Marriage Guidance counsellors, social workers, or probation/court-welfare officers. MID was not prepared to accept mediators not having a certificate of social-work or counselling experience. Three of MID's mediators had training in family therapy. The service's mediators met at least once each month for case discussions with the service's consultant and for discussions about current developments in mediation.

Sometimes MID's mediators comments suggested the abandonment of dispute resolution in favour more therapeutic processes, for example:

> Family systems has been very helpful. Even if I don't do it with families, I do it in my head - geneograms. It is marvellous how you can capitulate what you are seeing. It is quite helpful for them to do it themselves, to draw it up so they can see where the alliances are . . [*Is there anything which doesn't work?*] John Haynes. I read the book and thought it was marvellous. I have since forgotten what was in it. . . It is a straight negotiation method. . . I don't think his way of working is particularly relevant to us. I used to get them to make up lists of what I want out of this. . . I relied on it. Back then I did much more straight negotiation. . It didn't settle [with me]. . . In the beginning we were all hanging onto tools like agreement forms or lists. We've now grown beyond [that]. (conciliator)

Most responses given by members of this service, however, suggested that they were seeking to combine dispute resolution:

> Well I think it [the goal] is to help couples communicate better over the conflict and to reach some sort of agreement about those areas which are not so greatly conflicted; to isolate what areas they can agree [upon] and

> to separate those from the ones which are likely to continue in conflict. It has to do with conflict and reducing the whole temperature. (conciliator);

with a therapeutic perspective:

> We seek primarily to resolve issues but we also hope that in the process underlying issues are also resolved. (conciliator)

> We've found quite a few family therapy techniques useful in rebalancing power and reframing and I think positive connotation. What I've found isn't useful is hypothesizing. . . [*Hypothesizing about?*] As to the likely meaning of the symptom . . looking ahead, predicting. It is better really to work with what is actually being given or being said in the session. (conciliator)

For the most part the mediators' answers at MID did not indicate the application of family systems therapeutic methods in place of dispute-resolution ones. Instead the mediators appeared to be adding therapy to the process or keeping therapeutic theories in the back of their minds for use as a conceptual aids.[168]

MID mediation sessions normally started with the mediators laying the ground rules for mediation. Clients were assured of mediator neutrality; were asked for permission for the mediator to terminate sessions if no progress could be made; were told that all decisions would be their own but that the mediators reserved the right to withdraw if any agreements made were seen to be detrimental or unfair; and were assured of confidentiality with two exceptions: the mediators reserved the right to contact the disputants' solicitors to comply with the NFCC code of conduct and also the right to ensure that the appropriate services were contacted if any child appeared to be at risk.

MID had not created a definite mediation structure. The mediators worked singly or in pairs depending on the level of conflict involved, disputant preference, and mediator availability. In 1987 the service was handling an increasing number of its mediation sessions in pairs. The sequence of mediation sessions varied. Disputants might be seen separately, jointly, separately then jointly, or jointly then separately:

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168 For further discussion, see chapters 6 and 12.

> [There is] a bit of a difference whether I am working alone or with a co-worker. . . Let us assume I am working alone. I would try to get them both to come in together. If it emerges that the level of conflict is so great that they need space for themselves, then we offer a solo appointment with the expectation that there will be a joint appointment or as many as we agree are necessary. Sometimes, having started with a joint appointment it becomes clear that they are too angry, too inhibited or grieved to actually use this agency properly until they have some ventilation themselves but it has to be made clear throughout that this is not a therapeutic agency as such. We may use a few therapeutic techniques in the process but that is not the aim. . . Sometimes, particularly if I start with joint appointments alone, where I feel solo appointments are necessary and offer this to them separately, I may have them back jointly myself but not always. I may feel what is needed in the next session is joint conciliators. Sometimes, where we start with a solo appointment, having met one partner, I may feel that there are very good reasons why the other partner should have a different worker and then the four [of us] will get together for a joint appointment. . . It varies immensely. (conciliator)

Mediation sessions normally progressed from individual to joint sessions, however, rather than the other way around:

> [*So sometimes you break off for separate sessions with the parents?*] It is much more likely the other way around. We start separately and then see them together because we like to view the separate appointment as preliminary to the joint. There have been occasions where we have felt it to be of benefit to model the separation by having two workers work in separate rooms with the two individuals. So it does happen, on occasion. (conciliator)

Here again we find a therapeutic perspective in the way MID mediators approached dispute or conflict-resolution. 'Modelling the separation' is a therapeutic, not a dispute-resolution process. There are other reasons a mediator might choose to separate disputants in this way, for example: when the levels of conflict, anger, antagonism do not allow rational face to face discussion; when the disputants need to be taught effective communication and negotiation techniques; when the mediator attempts to balance differences in the negotiation powers of the disputants.

The mediators at MID believed that decision-making should remain the responsibility of parents and not of children:

> Certainly I think the decision making should be taken control of by the parents, however distressed or depressed or confused they may be. . . [so] they are not looking to their children to suggest or to take matters out of

> their hands . . so that the children don't get an inordinate sense of responsibility from their parents. (conciliator)

Consequently MID did not usually involve children in the mediation process, although it did not prohibit parents from including their children when this was specifically requested. If children were included in the mediation process, they tended to be included after the parents had reached a tentative agreement. Occasionally children were seen by one of the service's mediators, not for the purpose of including them in the decision-making process, and not for the purpose of using their comments to fashion a particular agreement, but solely to give the children an opportunity to talk about their worries and concerns:

> One of the reasons we would invite children in or respond to a request to bring the children is where the children are clearly suffering a high level of anxiety and they cannot cope with it and part of that anxiety is that the parents are going off to all sorts of strange places that the children don't know. So this is less formal and it is quite a reassuring experience for most children to have come and to have seen it. Sometimes the parents are genuinely in doubt as to what the children really feel about the situation or they feel the children don't have anyone to express their feelings to and then we can offer some kind of . . place where they can talk without any pressure to reveal what was said. Or we can help the child to find a way to explain to their parents what is distressing them. . but we don't set ourselves up as doing the work for the parents. (conciliator)

We know that children in the midst of the divorce process appreciate being able to talk to a neutral, empathetic adult about their concerns.[169] Perhaps other mediation agencies might consider offering this type of service to children.[170]

Normally MID mediation sessions lasted approximately one hour. MID mediators estimated the average number of appointments per couple as three and said the maximum number of sessions offered was six. Couples might, however, return for another series of mediation sessions if new or further difficulties arose in the future:

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169 C. Clulow and C. Vincent, (1987): 162-3; A. Mitchell (1985): 74; A. Mitchell and F. Garwood (1989): 285; J. Wallerstein and J. Kelly (1980).

170 In most cases it will not be appropriate, however, for the mediator who sees the children to mediate or co-mediate the family's disputes about the children. Mediators who do so run the risk of becoming negotiators for the children against the parents or one of them. This changes the mediation process. For further discussion, see chapters 3 and 5.

> Six sessions tends to be the maximum. I can only think of one couple, possibly two, in two years who got up to six sessions. Sometimes what happens is that there will be a series of meetings and then perhaps a year will go by and then the parents reappear with a new issue they want to bring so there may be two or three further sessions with new problems or the old problems in a new form. (conciliator)

The agreement process at MID varied from mediator to mediator and from family to family:

> With each worker it varies. We are writing out fewer agreements now. Quite often we get the couple to clarify and repeat what they think they are taking away and they go back to the solicitors. We tell them we will be writing their solicitors to say the work has been completed and they have reached an agreement but only in the broadest terms and that letter should be sent with their agreement. If the agreement is written out - I personally like each person in the room to write their own version - including the mediator and we pass it around and all sign it. We talk it through as we do it. It might be a very simple document you see. One person can read it off and one person can say put in this word instead of that and usually it is in two or three sentences and we can all sign it. (conciliator)

> It depends on the individual and how much they need to see it [their agreement] on paper. . . What is on paper is in their own words, not somebody else's. We will ask them what they have agreed and how they want to implement it. We put it in as brief a letter as possible. . . There were agreement forms. They were never used because this place doesn't feel to me like a place a business contract ought to be signed. I am uncomfortable with it but I am comfortable with a jointly agreed letter. (conciliator)

These mediators' comments about the simplicity and length of the mediated agreements were common to mediators from most of Greater London's mediation agencies. To a certain extent, this can be explained by the fact that many of the mediators were dealing with access or visitation disputes. Still, the simplicity and generality of the agreements was of some concern. Presumably the disputants' lawyers were being left to negotiate the detail. If so, what were the mediation services accomplishing? Were they resolving conflicts or merely setting the resolution process in motion? Were they providing an alternative to inter-lawyer negotiations, or were they merely starting that negotiation process by getting the disputants talking? The Newcastle Report found that lawyers did not routinely turn mediated agreements into court

orders.[171] Why? Had the mediators improved the relationships between disputants so much the formal agreements were no longer needed? Were the lawyers using these general agreements as a starting point for further negotiation? Alternatively, were the lawyers ignoring the mediated agreements entirely? These questions warrant further investigation.

In the fall of 1987 MID was conducting its own internal research to determine the therapeutic and counselling needs of families not being met during the separation/divorce process. MID was also beginning to look the incorporation of Milan family therapy methods and the use of a video camera in the mediation process. We shall have a look at the use of these methods when we discuss Service #16. When I contacted the service again in the summer of 1988, the former administrator had retired leaving the service with its five other mediators, and MID had new office hours: from 9:30 in the morning to 1:00 in the afternoon, 5 days per week. MID was continuing to use a family systems perspective and had not incorporated either the Milan approach[172] to mediation or the video cameras. MID had no connections to probation or court-welfare services, and did not write court-welfare reports.

Service #15: the Mediation Services of the North-East London Court-Welfare Service[173]

We turn now to the mediation services of the North East London Court Welfare Service. In 1987 the North-East London Court Welfare Service (NELCWS) employed a chief officer, and five other court-welfare officers, four working full-time and one working on a part-time basis. Two of the officers were male, the rest female. By the fall of 1987, another male officer had been added. This service conducted welfare enquiries

171 (1989): 345.

172 See service #16. For a theoretical discussion of Milan theory, see chapters 12.

173 The information which follows is drawn from in-depth, structured interviews with the head of this service and the five other court-welfare officers who worked there, interviews with two registrars, observation of fifteen in-court mediation appointments, attendance in two county courts during in-court mediation appointments, attendances at the offices of the court-welfare officers to conduct interviews, and examination of court and court-welfare internal statistical information.

emanating from any court whenever the children involved resided within one of five boroughs of North-East London. In addition NELCWS provided court-welfare assistance to Ilford, Bow and Romford County courts. Like the Middlesex court-welfare service, NELCWS did not provide court welfare services to Magistrates' Courts. All requests for welfare reports arising in the Ilford, Bow or Romford County Courts were processed by NELCWS. If the children resided within North-East London, this service conducted the enquiry. If the children resided outside the area, the service allocated the report to the probation or court-welfare unit serving the area in which the children were residing.

Two of the courts NELCWS served, Ilford and Bow County Courts had instituted formal in-court mediation processes. Romford County Court had not. NELCWS mediated only on an in-court basis. The service accepted no other referrals:

> I would refuse any referral from a solicitor, not that I have any objections. I can understand the frustration of lawyers when they would like us to see their clients as soon an they are involved but I haven't got the resources and I don't think it is appropriate within this agency. My first priority is to provide court-welfare reports, second is to assist with the in-court conciliation, third is to supervise any case the courts ask us to. I haven't the resources to meet anything else. (court-welfare officer)

Unlike other court-welfare services in Greater London, this unit did not have an officer in attendance in the courts for section 41 hearings. Consequently no mediation was conducted by this unit during that process. At Bow and Ilford County Courts any disputes arising during section 41 hearings which appeared amenable to mediation, were placed in the court's mediation list. Parents with conflicts arising in section 41 hearings at Romford County Court were be given dispute-resolution assistance by NELCWS when the court ordered a welfare report, if the children involved resided in North-East London.

The service did, however, include mediatory processes in the court-welfare enquiry process:

> So [when we do court-welfare reports] we get them in together and we don't decide how many sessions [we will have] until the end of that first interview and then we would negotiate with them. ... The first session may really be dealing with perhaps letting the wife grieve. The real decision is not about the children but about deciding that the marriage has really ended. A lot of people come who haven't really made that decision. ... We tend to get the whole family in and we see them as a family unit and what we try to do is to get the parents to acknowledge their parenting responsibility. (court-welfare officer)

Unlike most of the other court-welfare services in Greater London, NELCWS did not separate mediation from its court-welfare investigation process:

> To say that the part of my involvement in the court setting is somehow different because I am doing it in-court as opposed to at the office is a nonsense to me because I'm not doing anything different, only I'm doing one in court and one in the office. (court-welfare officer)

In either case the court-welfare officers were trying to get the parents to continue parenting their children in spite of the separation or divorce, and to get them to reach an agreement on how they would do so:

> I take the view that the least court intervention in the situation, the better and ... I think that can best be met by getting the parents to acknowledge that, in spite of the fact they have broken up, they still have a role to play with the children and that it is an ongoing role and as far as possible they meet that responsibility by mutual consent while acknowledging the needs of the children in that situation. (court-welfare officer)

The officers distinguished their own role from that of other mediators on the basis of their professional duties to protect the best interests of children:

> From the point of view of conciliation as seen by the NFCC, where the parties are coming voluntarily and the conciliator has only one task, to act as a catalyst; while I think it is appropriate for us ... to use a conciliatory approach, we have a special task and the parties have to be aware of this. If they reach an arrangement suitable to the court that is fine, but if they agree on an arrangement which is seen by the professional court-welfare officer as being not appropriate, then one has to say that. (court-welfare officer)

Disputant decision making, as described here, is made subject to third party approval. While it is entirely appropriate for court-welfare officers to protect the interests of children throughout the court process, we might think about whether the process being described here is mediation or a form of directed settlement seeking or

arbitration. The court-welfare officers did not have the power to impose a decision on the parents at this stage in the court process, but they did have the power to advise the court not to accept parent's proposals. If the officers then wrote a court welfare report on the family to be relied upon by the court in making its judicial decision, the practical effect was adjudication. Potentially the court-welfare officer, not the parents or the family, had ultimate decision-making authority.

NELCWS officers applied their professional duties to protect children with equal force to mediation and to court-welfare investigations. Consequently they did not offer disputants confidentiality in mediation, and the service did not think it necessary to differentiate 'mediation' from its other court-welfare work:

> We don't see any major difference. This is a major bone of contention between us and other groups: this legalistic approach. People in ordinary life don't say something confidential in one place and then turn around and say it wasn't said or that they didn't hear it. Almost all of the people who have family work experience have all said this special privilege is unimportant and indeed quite irrelevant. In our County Courts the registrar asks the parents, if a case is being referred for a welfare report, if they object to the same officer continuing with the report and I don't think it is ever that they have objected. The importance of it being a fresh start seems a nonsense. In fact most people would be threatened because they begin to get confidence in you at the court and then to say that there will be another ordeal of a meeting somewhere [is threatening]. (court-welfare officer)

There is some support in the literature for this officer's contentions that disputants do not object to mediators making recommendations to the court, and that they do not like having to go back over matters already discussed in mediation during the investigative process.[174]

NELCWS provided assistance to families with respect to disputes concerning children. Property and financial matters were considered to be outside the scope of the service's duties:

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174 G. Davis (1988a): 147; D. Saposnek, J. Hamburg, C. Delano, H. Michaelsen (1984): 7. The Newcastle Report (1989): 281-284, found that consumers were confused about and often critical of the separation of mediation from investigation and adjudication. But see also: A. Elwork and M. Smucker (1988): 21.

> Matters of ancillary relief are settled by solicitors. They do arise occasionally but unless it affects the children directly ... I don't know anything about ancillary relief. I would be very reluctant to advise anyone on that. The only ancillary relief I deal with is whether or not it is appropriate for the children to stay in the home they are in. ... We deal with it on that basis but not on the basis of if dad is kicked out, how much of the home he should receive. I don't see that as appropriate. (court-welfare officer)

We turn now to a discussion of the in-court mediation services this unit provided at the Ilford and Bow County Courts. Because these services were similar, they will be described together. Both courts listed for in-court mediation, applications for the resolution of child custody, access or care and control disputes including, when appropriate, guardianship disputes.[175] During the one year period from the beginning of September 1986 to the beginning of August 1987, NEL mediated 106 in-court mediation cases at Bow County Court and 89 at Ilford County Court.[176]

Both courts asked solicitors not to file affidavit evidence until the mediation sessions were over. If the disputants failed to agree during the mediation appointment, the proceedings at both Ilford and Bow County Courts became a directions appointments and procedural directions for trial were given.

Both Courts scheduled a maximum of six mediation cases per day.[177] Two families were scheduled to appear before the registrar every hour from ten o'clock in the morning until twelve noon. The two court-welfare officers in attendance worked independently. The registrars, therefore, saw a total of six families, one mediation case every half hour, while each court-welfare officer saw a total of three families at the rate of one family per hour. This is the maximum number of mediation sessions

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175 At Bow County Court cases involving severe abuse or incest were excluded from mediation and sent directly to the judge. Ilford County Court included all cases scheduled for section 41 hearings whenever the parents were still living under the same roof because the Court's judge would not grant section 41 certificates in those circumstances. (This information was given to me by the registrars of the two courts.)

176 Internal NELCWS statistical records. Ilford is a smaller court. It had one registrar and one judge. Bow County Court had two full-time and three part-time registrars. Mediation sessions at Bow were normally held before the full-time registrars.

177 The day I attended Bow County Court there had been a computer error. Consequently nine cases were listed instead of the customary six, but this was unusual.

Greater London mediators thought appropriate on a daily basis.[178] NELCWS officers reported having more than one hour with the families when there were cancellations, and when cases were already or easily resolved. As in the other courts, the preliminary part of the mediation proceedings before the registrars took normally five to ten minutes. Consequently the registrars scheduled a variety of non mediation matters between mediation appointments, proceedings such as: ordinary directions appointments, applications for consent orders in financial and property matters, applications for disclosure of financial or other information, and applications for the resolution of disputes arising over procedural matters. This enabled the court-welfare officers to continue working with the families without running the risk of tying up the registrar's time.

Ilford and Bow County Courts asked parents to bring to in-court mediation all their children over the age of nine. As in the other courts, parents could bring younger siblings if they wished. At Ilford County Court the children did not normally attend the discussions with the registrar, although occasionally older children came before the registrar at the end of the mediation session to hear the registrar confirm the parents' agreement. Occasionally the parents brought the children before the registrars at Bow County Court.[179]

The registrars in both courts, like most of those in the other courts, used large, book lined rooms for the mediation appointments. The registrar at Ilford County Court had the two tables in the room he used for mediation set side by side along their length, rather than in a 'T' pattern. This created the impression of informality and encouraged round table discussions. As in most other courts, the preliminary appointments before the registrars were used to identify the areas of dispute and to

178 See Service # 1.

179 One of the registrars at Bow County Court mentioned that children sometimes attended mediation before him but I have no information on the frequency of this practice. The registrars in most of the other courts preferred not to see the children. It appears from the research of others that most registrars do not see the children: W. B. Baker, J. Eekelaar, C. Gibson, S. Raikes, (ISSN 0309-6408)

stress court endorsement of the settlement process. The two registrars observed during mediation appointments in these courts appeared to be adept at putting people at ease and disputants appeared to find it easy to speak directly to them. Full airing of the disputes and argument, however, were reserved for the private discussions with the court-welfare officer.

After isolating the matters in dispute, the disputants were encouraged or asked to go to speak privately with the court-welfare officer in attendance. (Exceptionally, at Bow County Court, if the disputants' solicitors appearing for mediation indicated that the case was not resolvable, no effort was made to encourage mediation and directions were given immediately.) The registrar at Bow County Court was very careful to stress to the disputants that they were under no obligation to reach any agreement. Both registrars told the disputants that if they reached an agreement an order would be granted on consent and if not, further directions would be given. The sessions were then adjourned for discussions with the court-welfare officer.

The disputants (normally the parents) and the children, if brought to the court, were then taken by the court-welfare officer to a separate private room in the court building for further discussion. When court-welfare officers in this unit included the children, they usually included them with their parents rather than separately:

> We usually see them together. Our method is fairly simple. We tend to see the family together from the start and then we work backwards from there if need be. (court-welfare officer)

Occasionally, if it appeared necessary, children might also be seen separately:

> There are some times when we start out with the family and might find there is a need to discuss with the children or everyone feels it is important that we should spend some time with the children on their own and if it seems appropriate to us, we will do that but normally they are included in the session. (court-welfare officer)

These private sessions with the disputants or with the disputants and their children were used to siphon off from the court-welfare investigation process simple

cases needing only limited dispute-resolution assistance, and also applications to the court having no hope of success:

> The in-court conciliation, if we stuck by the President's direction, should be privileged but we use it more in terms of an initial testing of the water: to see whether the matter can be cleared at that stage or whether the matter is too complex and a full welfare report is needed. (court-welfare officer)

> During our discussions they are faced with the reality of what the judge is likely to do in that case. Take the case where mother has young children and they are in the home with her. Then we can say, "Well the judge is going to have to have very good reasons to disturb that situation. Would you like to look at what you are proposing again?" Arising from that sometimes we get an agreement on what the parties think is appropriate. That is then discussed with the solicitors and we go back to the court, the solicitors will say, "an agreement has been reached" and the registrar will make an order then and there. (court-welfare officer)

After the private discussions the disputants met briefly with their legal advisors to advise them of the outcome of the private discussions and then the meeting reconvened before the registrar. In all cases I observed, NEL's court-welfare officers simply reported the results of the private discussions to the registrar, for example: 'the parties have agreed on x, y, z'; 'the parties are unable to agree and a court welfare enquiry is needed'; 'the case appears to be unresolvable and a court-welfare enquiry is not likely to help'. He or she did not disclose what was said. This does not mean, however, that there was never any further discussion of the dispute before the registrar. Occasionally the reconvened appointment before the registrar became a round table discussion with everyone in attendance participating in the resolution of last-minute details.

Bow and Ilford County Courts did not normally adjourn cases for further 'adjourned in-court mediation' sessions. If an agreement was reached an order was granted then and there. If progress had been made with the family, or if settlement appeared possible, a court welfare report was ordered. If no progress appeared possible, the case was scheduled for hearing without a welfare report:

> At the other extreme, say the attitudes are so entrenched you are going to get nowhere with it and we feel a court-welfare report isn't going to help because they are so locked in, we would explain it to the registrar and he would then probably go ahead and fix the matter for a full hearing before the judge so the matter is argued out in court. That tends to be the rare occasion. (court-welfare officer)

When a welfare investigation was ordered, it was normally carried out by the same officer who conducted the in-court-mediation appointment:

> Our court is perhaps unique in jumping over the President's Direction.[180] That was negotiated locally. (court-welfare officer)

This officer is referring to the President of the Family Court Division's direction to the Association of Chief Probation Officers asking for separation of mediation and court-welfare investigations.[181] This direction and the court pronouncements to the same effect[182] had done little to change court-welfare practices in Greater London.[183]

In every in-court mediation cases observed which resulted in an order for a court-welfare report, the registrar asked the disputants if they minded having the mediating officer prepare the report, the disputants did not object. The registrars did not, however, explain the reasons for the question, nor did they suggest other alternatives. It was doubtful that the disputants understood the implications of their assents.[184]

NELCWS's internal records indicated that between September 1, 1986 and August 1, 1987, 41 (46.1%) of the 89 in-court mediation cases at Ilford County Court

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180 In February of 1986 the President of the Family Division sent a letter to the Association of Chief Probation Officers asking court-welfare officers to separate the mediation and court-welfare processes: C. Jackson (1988): 296. See also: Practice Direction: Children: Inquiry and Report by a Welfare Officer [1986] 2 FLR 171.

181 Ibid.

182 Clarkson v Winkley as reported in Justice of the Peace 151 No. 33. (1987): 526; Re H (Conciliation: Welfare Reports) [1986] FLR 467; Scott v Scott [1986] 2 FLR 320.

183 See also Service #16. It is unlikely that the National Association of Probation Officer's (NAPO) (1990) policy paper affected NELCWS's practices because NELCWS's processes did not fall within NAPO's definition of 'conciliation': the NELCWS process was not voluntary or confidential.

184 Even if disputants, or many of them, do prefer to have the mediating officer prepare the welfare report, the alternatives should be made clear to them. If disputants are told that the in-court mediation process is confidential and privileged, the full implications of waiving confidentiality and privilege should be explained before consents or waivers are taken. If no confidentiality and no privilege attaches to the in-court mediation process, this should be made clear to the disputants at the beginning of the process.

were settled by agreement; 26 (29.2%) resulted in a court-welfare report being ordered; 11 (12.4%) were adjourned (because, for example, someone did not appear, the disputants wanted to try an arrangement on a trial basis, or they wanted to try out-of-court mediation); five (5.6%) were withdrawn; two (2.2%) were scheduled for hearing; two resulted in a partial agreement and an order for a welfare report; one was transferred to another jurisdiction; and the other was scheduled for blood tests. At Bow County Court 106 cases were handled by NELCWS during the same period. NELCWS records show that of these: 47 (44.3%) resulted in an order requesting a court-welfare report; 42 (39.6%) resulted in agreement; 7 (6.6%) were adjourned; 6 (5.7%) were scheduled for hearing; 2 were withdrawn; one resulted in a partial agreement and a welfare report; and one was transferred to another court. We should note here that families whose cases are adjourned may reach agreement during the adjournment period and that withdrawal of a case often reflects agreement. In addition, some families scheduled for a welfare reports reach agreement during the enquiry process. The true rate of agreement reflected by these figures is, therefore, probably in the vicinity of 61% (57.7% full and 2.8% partial) at Ilford and 44.8% (43.8% full and 1% partial) at Bow County Court.[185]

We have already noted the fact that NELCWS incorporated conciliatory processes into its court-welfare enquiry process, and that in-court mediation cases appearing amenable to further progress were referred to NELCWS for court-welfare reports rather than for adjourned in-court mediation sessions, as in other court-welfare units. NELCWS officers reported that most of their mediation work with families was conducted during these court-welfare investigations. Families who were referred to the unit for court-welfare reports usually first faced a series of 'mediation' appointments at the court-welfare unit's offices:

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185 The rates might be higher if we knew the number of cases settled during the conciliatory part of the court-welfare investigations.

> We try to get people to come here [to the court-welfare offices]. . . We don't conciliate as a conciliation service would but what we tend to do is to get the whole family in and we see them as a family unit and what we try to do is to get the parents to acknowledge their parenting responsibility and to get them to go on accepting their responsibility as parents. If we can get an agreement . . and we believe that agreement is in the best interests of the child then we would prepare a very limited report in which we would set out the enquiries made, set out some of the circumstances of the parties and at the end of it we would say the parties have agreed to the following matters. . and we wouldn't go much further than that. (court-welfare officer)

> They may be using the children as a bridge to each other so in the first session the children might not really come into it at all so then you have got to have another interview. . . The next interview might be about the children and then you might have a third interview. It averages out, when I looked at our figures sometime ago, to 2.18 interviews with the family over the 30 reports I looked at. (court-welfare officer)

If the family refused to come to the office together, the unit was forced to proceed with individual interviews:

> What we usually do is invite them in as a pair to start with and just hope that they will come. Sometimes we do have to resort to seeing them singly but we do try to see all the family together to help the parents to do their parenting but preferably we start by seeing them together. (court-welfare officer)

The court-welfare enquiry and mediation processes, as they were described to me, appeared to be a combination of settlement seeking; time-limited family counselling and therapy methods; family assessment; and investigation:

> [*What is the role of the mediator?*] (Joint interview: a change in speaker is identified by a change in number.) #1: I think what the conciliator tries to do is to keep the balance, to try and keep things to the matter at hand, although there may need to be a discussion of all sorts of irrelevant things just to get them out of the way, but still you are there to bring them back when they need to be; to give some direction and focus to the discussions. And to rephrase sometimes what people have said, to simplify what is coming out and to help them plan for the future. #2: I see it as bringing them together. Otherwise they would still be getting one side from one side and another one from the other. . .#3: Our job is sort of easy: to sort out the demarcation lines but I suppose we do run over boundaries quite a bit. [*In what sense?*] Into family therapy really and family work. One thing we don't do, which social workers do, is that we don't have a relationship with our clients. We are all very much middle people. (three court welfare officers)

> Divorce is damaging to the ego and you can help give them permission to be hurt, to grieve, to realize that some of the differences between them are never going to resolved and they may need to stick with their hurts,

> because maybe it protects them. It almost sounds like family therapy but you can touch on these issues, bring them into the open and alter the climate. ... We can't do family therapy but you can introduce new agendas and help with communication and make them face the fact that a decision has to be made. (court-welfare officer)

> We can let all of the parties talk out their feelings about the marriage and get this out of the way and we can say, "we understand where you are but as far as we are concerned, we will only look at that in terms of how does this affect your child" because that is our responsibility. We haven't got time to get involved in family therapy and "if you need help with the breakup of the marriage, perhaps you ought to seek that elsewhere and we can advise you on that." Then I try to focus on where the children are and say, "right, as a group of people how do we solve this. You are divorcing and you are the parents of these children and despite your divorce, the children still see you as the parents. ... What sort of structure can be set up between you to ensure that you will be able to maintain your responsibility to these children?" (court-welfare officer)

This unit had not, however, abandoned investigative court-welfare processes entirely. These were still used in most wardship cases and in cases that appeared to involve abuse or violence:

> There are situations where conciliation is difficult and an investigative approach is more appropriate, mainly in wardship, particularly where the local authority is intervening and they have care of the children. ... Our role then is to investigate as fully as possible what is going on ... and to get the best possible information. (court-welfare officer)

> (A change in speaker is identified by a change in number) #1: But there are times when you have to look at things that can't be conciliated about. Like where the father is saying I wouldn't mind the child staying there but she is terrified of my wife's boyfriend and so you might have to go around to the house to see them together. You can discuss that until you are blue in the face and it would be pointless. #2: and I suppose where the parties are still getting at each other violently, then conciliation would be pointless. (two court-welfare officers)

When children were seen during investigative processes, they were usually seen as part of the whole family rather than on their own. If the discussions became inappropriate the children were subsequently excluded. Children were not seen separately from their parents unless there were specific reasons for doing so:

> We generally involve the whole family together and have several sessions like that. Sometimes where inappropriate matters are being discussed we exclude children. ... We don't allow parents to put decisions on children. Whether we see children separately would depend. If the parents ask we will discuss it first in the family meeting: why and what they hope to accomplish. If we are concerned [about the welfare of the children] we

> will see the children, either in the office or at home and again with the parents' consent. (court-welfare officer)

The purpose of conciliatory meetings during the welfare enquiry process was less to obtain consent orders and agreements than to get the parents to communicate and to take joint responsibility for their children:

> Sometimes the communication is more important than the agreement because the agreement you reach can be flexible, can go out the window after three weeks, ... but if you can improve the party's communication and you have got them to admit responsibility for the children, then this can stay even if the whole thing breaks down. (Court-welfare officer)

The form of court-welfare report written by this unit depended on whether or not an agreement had been reached in the enquiry process. Normally the officers included a report on the progress made in the family meetings, an assessment of the family, a list of enquiries made, and some factual information. The unit was loath to make recommendations:

> If we believe that the agreement is in the best interests of the child then we would perhaps prepare a very limited report in which we would set out the enquiries we had made, some of the circumstances of the parties and at the end we would say the parties have agreed on the following matters and we wouldn't go much further than that. Where there is a partial agreement, we would set out the situation of the parties, their feelings, we would set out the areas where they agree and we would do a brief piece on the children and their circumstances. We might involve the schools, we might involve social services if they have been involved with the family and we would advise the judge on the areas that had to be settled. If there was no agreement at all, we would tend to set out the situation as we see it and then we would leave it up to the judge to make a decision. We don't usually make a recommendation. (court-welfare officer)

The premises this court-welfare service occupied in 1987 were suited to family work: a modern, one storey building with many windows, set well back from a busy street in a large garden. The building was occupied only by the court-welfare service and the reception there was always warm, relaxed and friendly. NELCWS had facilities and toys for the children on the premises. Sadly, in the later part of 1987, this unit was informed that the lease on these premises would not be renewed and that they

would have to find new premises. The service was still in the process of finding new premises when I contacted them again in the summer of 1988.

NELCWS was in a state of transition during the 1987 and 1988 period. In addition to relocating, the service was beginning to look at the incorporation of more therapeutic ways of working with families:

> We are looking at the systemic approach. ... What I would like to do is to get our officers working conjointly. Our whole team went up to Birmingham. They use a system of a two way mirror: of one officer being in with the parties and another being behind the mirror and I am in the process of looking at this, of acquiring a mirror in this unit. (Senior Court-welfare officer) [186]

In 1987 the officers of NELCWS occasionally worked in pairs conducting the conciliatory part of the court-welfare enquiry process. This service reported that this practice increased steadily during 1987 and into 1988. The service was experimenting with different methods of conjoint working before becoming committed to any one model:[187]

> What we are hoping to do is to . . have a really good study of conjoint work before committing the unit to any particular way of working. But there are a number of ways of conjoint working and we were hoping to use the mirror to test out those approaches. (Senior Court-welfare officer)

Among the approaches NELCWS was examining were: having one officer interview the family while another officer acted as a consultant; having two officers work with the family, one in charge of the interviews and the other assisting; having two officers work with the family on an equal footing; and having two officers, one male and one female, work with the family on an equal footing.

The literature on conjoint working with families could not give NELCWS terribly much guidance on this issue. We know, from the mediation literature, that mediators prefer to work conjointly and preferably in male/female teams.[188] It is not

186 Services # 16 and 17 incorporated some of these methods.

187 The NELCWS was interested in critical self-examination and in independent research to evaluate its own methodology.

188 L. A. Cornfeld (1985): 55; T. Fisher (1987a): 365; E. Lyon, N. Thoennes, J. Pearson, R. Appleford (1985): 15.

clear, however, that male/female balance has a positive effect on mediation outcome or that it is considered to be important by the disputants.[189] To date, there is even less evidence that two people working with a family are more effective than one.[190] Most 84.3% (86) of Greater London's mediation practitioners expressed a preference for co-working (27 of these gave qualified answers, citing circumstances when a single worker might be preferable). The remainder said they preferred to work singly or were ambivalent. The majority of the mediation practitioners favouring co-working stressed the importance of providing male/female gender balance in the mediation sessions. Interestingly, after gender balance, the advantages most commonly cited concerned the workers rather than the clients: for example, the ability to share pressure and responsibility. Perhaps co-working offers advantages to mediators and other family workers that are independent of result and client satisfaction.

When I contacted NELCWS again in the summer of 1988, the head of the service was asking the service's officers to conduct welfare enquiries in pairs using different methods of co-working on an experimental basis when the volume of work permitted. NELCWS's high volume of cases did not always allow this, so many of NELCWS's welfare enquiries were still being conducted by a single officer. The unit had not yet acquired, but still expected to acquire, a one-way mirror or video camera. NELCWS's in-court mediation process had not changed except that the addition of an extra officer enabled the service to offer three extra mediation days every six months in the Bow and Ilford County Courts.

This completes our examination of the three mediation services in Greater London which offered dispute resolution mixed with a tinge of family therapy. Two of the three services were in a state of transition and appeared to be moving towards the

189 Department of Justice (Canada)(1988a) 216; J. Pearson and N. Thoennes (1988a): 74. On the other hand see: C. Clulow and C. Vincent (1987): 157; Newcastle Report (1989): 366; J. Waldron, C. Roth, P. Fair, E. Mann, J. McDermott Jr. (1984): 12-16.

190 I. Goldenberg and H. Goldenberg (1985): 311; A. Gurman and D. Kniskern (1981): 751; Newcastle Report (1989): 366.

adoption of more therapeutic processes. We turn now to an examination of the two mediation services in Greater London that used therapeutic processes almost entirely, sometimes to the exclusion of dispute-resolution methods. As we move through the service descriptions, we should keep in the back of our minds the dispute-resolution service descriptions in sections 1 and 2. We shall find little resemblance.

Section 4: Therapeutic Mediation Services in Greater London

Service #16: Family Courts Service on Balham High Road in Wandsworth[191]

The first therapeutic 'mediation' service to be discussed is the Family Courts Service located on Balham High Road. The Family Courts Service on Balham High Road (hereafter called the Balham service) was created in 1983.[192] In 1987 the service employed one chief officer and two full-time court-welfare officers. The office served the Wandsworth County Court, and the Southwestern and Cumberside Green Magistrates' Courts. In 1987 this service was given all the court-welfare work emanating from any English court if the children involved resided in the Lambeth or Wandsworth areas. In addition to Balham's work for the courts, the service accepted clients who came to the service for assistance voluntarily. People did not have to be involved in the courts, nor did they have to have children living in the Lambeth or Wandsworth areas to voluntarily partake of Balham's service.

During 1988 the Inner London Probation Service, of which this unit formed a part, began to re-organize in accordance with recommendations contained in the Inner London Probation Service's Review of Civil Work (hereafter called the *Inner London Report*) which was published in March of 1987.[193] Consequently by the summer of 1988 three additional full-time officers had been added to this unit and the service's coverage had been expanded to include exclusive jurisdiction over any court-welfare work to be done with families having children residing in any part of Southwark. If the recommendations of Inner London Report are fully carried out, this unit will eventually

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191 Except where otherwise indicated, this information is based on formal interviews conducted in 1987 with two of the service's three court-welfare officers, formal and informal interviews with two registrars working in Wandsworth County Court, attendances at six in-court mediation appointments held before one of the registrars, and several attendances at the Family Courts' offices on Balham High Road. Information about the service was updated in the summer of 1988 by a third, newly hired, court-welfare officer.

192 R. Gray, D. Hancock, and J. Hutchings (1987): 3.

193 Ibid.

do all the court-welfare work to be conducted with families having children residing in four Inner London buroughs.

The first thing we should note about this service is that during 1987 it was beginning to abandon the use of the terms 'mediation and conciliation' in favour of the term 'family work'. This was partly because they were not comfortable with the confidentiality associated with mediation:

> We have dropped the term 'conciliation'. The President of the Family Division had defined conciliation as something which is both voluntary and privileged and as court-welfare officers it is very doubtful whether we can be engaged in anything which is privileged when the best interests of children are our primary objective ... We don't call it anything. Whether we have a referral from the courts, from social services, or whether they walk in from off the street, we have the same objective - the objective being to reestablish their ability to negotiate with each other [and] to take decisions for themselves. We don't apply a label to that really. (court-welfare officer)

Nor was the service happy about what they considered to be an artificial distinction between mediation and the court-welfare report process:

> [*If conciliation breaks down, do you write a report?*] This comes down to the Practice Directive. With great respect, I think it is on the wrong track - because the whole argument is confidentiality and it is said that the conciliation must be confidential and if you mean by that it doesn't go beyond the court-welfare officer, the solicitors and perhaps the social workers involved, we are all agreed. Obviously you are not going to blaze a family's problems from the rooftops. But if what is meant is that what is said in conciliation is confidential to the court-welfare officer and shall not be passed on to the reporting officer, then I ask: 1) it cannot surely apply to anything the husband and wife have said to each other because they've said it. Each knows what the other has said ... 2) [there is] no way, as a practical rule, that you can stop Mrs. Jones saying to the court-welfare officer what Mr. Jones said to the conciliator. We now have to respect the presidents' direction so now if we think conciliation will fail, we tend to order a court-welfare report ... They then go along to see the court-welfare officer and exactly the same procedure is followed. If it is sorted out, well and good. There is no report except to say that the parties have agreed ... The practice directive says that while you can't conciliate and do a court-welfare report, you can help the parties to agree and I ... don't understand the difference. (registrar)

Despite the fact that this service claimed to be abandoning the use of the terms 'mediation and conciliation', the service, and its officers continued to be included

in this study, for a number of reasons. First the service did not always distinguish what it did from mediation. As we shall see in some of the quotations in this section, the term 'conciliation' was still being used by the practitioners and the process was still being referred to as 'conciliation' in some of the services' public publications.[194] (I note that the term 'child conference' is now being proposed for the in-court mediation process.[195]) It was therefore doubtful that members of the public understood the difference between the processes this court-welfare service offered and the mediation services offered by other services. Second members of the public seeking court assistance with the resolution of family problems in any of the courts served by this unit, or those seeking assistance from other courts but having children residing in the Lambeth and Wandsworth areas of London, were being offered Balham's service instead of mediation and instead of court-welfare investigations. For these members of the pubic, this was the only service available to them. Finally, this unit were included for contrast. It was felt that these officers could provide a perspective on the education and training mediators need from a therapeutic perspective.

In a 1985 report on this unit prepared by G. Smith, this service reported that much of its' work with families on separation and divorce was being conducted in situations where no court-welfare report had been ordered.[196] The report noted that most of the cases not involving welfare reports were coming to the service on direct referrals from solicitors (29: 35%) or clients were referring themselves (20: 24%).[197] In 1987 the members of this service estimated that 50% of their families were coming to the service voluntarily, rather than on referral from the courts for welfare reports.[198]

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194 D. Price, letter (1987): 66. In fact the term is still occasionally used to describe the service: D. Price (1989): 277-279. See also: M. Day, A. Jones, C. Owen (1984): 201; D. Price, M. Bilmes and M. Day (1985): 231.

195 D. Price and D. Handley (1989): 278-279.

196 G. Smith (November 1985).

197 Ibid.

198 This trend appears to have continued into 1989. See: D. Price, (1989): 278.

Presumably families who agreed to attend Balham sessions at the end of in-court mediation sessions were classified as voluntary clients.

Balham provided its' family services both in and outside the courts although by far the majority of the service's work was being conducted outside the courts, in the Balham unit's offices. During 1987 and continuing into 1988 the only in-court 'mediation' service provided by this unit was that operating at the Wandsworth County Court. This was one of the first in-court mediation schemes in operation in England. It was established in 1980 or 1981,[199] prior to the establishment of Balham as a specialist court-welfare unit. The Wandsworth in-court mediation service was limited to disputes over children. Property and financial matters were not included.

Although the Wandsworth mediation service operated in court, solicitors were encouraged by the court to send clients to Balham directly prior to formal application to the court. This encouragement was seen to be one of the major advantages of having an in-court mediation service:

> We also encourage solicitors to send their clients down [to the Balham Service] direct nowadays. There is this awkward man, Mr. Price, sitting here in this chair so the solicitors know they have got to go through this anyways so they often say to their clients, "there is an argument about the children, go and see Family Courts Service first." That means they don't come here . . . but I think if we stopped this system those referrals would dry up. (registrar)

In 1987 there were two registrars working in Wandsworth County Court. The court had the advantage of having two waiting rooms available for the disputants and two interview rooms for meetings between disputants and the court welfare officers. This allowed the disputants to wait in separate areas if they wished. This was probably appreciated by disputants appearing before this court. We know from the literature that

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199 There appears to be some confusion over the date these sessions started: G. Davis & K. Bader (July 1983): 10], have the date as February of 1981 but Registrar Price maintains he started the service in 1980: Price (1989): 278.

many family-law disputants feel uncomfortable or complain of a lack of privacy when forced to share waiting facilities with those on the other side of their legal dispute.[200]

Wandsworth County Court registrars selected the vast majority of custody and access applications for inclusion in the mediation list. On formal court documents this court referred to in-court mediation meetings as 'directions appointments'. If no resolution was reached in the in-court mediation process, and the parties would not agree to go to Balham voluntarily, a court welfare report was usually ordered. The parties and their legal advisors were expected to attend the mediation/directions appointments before the registrar. Lawyers were asked not to file affidavits until the termination of these in-court appointments and any subsequent meetings at Balham offices.

The preliminary part of the mediation appointment was similar to that in the other Greater London courts. The appointments were held in the registrars' large, book lined offices. One of the registrars, one of the court-welfare officers, the parties and their lawyers, if any, were all expected to attend. Two officers were usually available to the mediating registrar, allowing one officer to sit with the registrar with one set of disputants while the other was engaged in mediation proper with another family.

All of the in-court mediation appointments appeared to be scheduled for the same time. Parents who had reached agreement, or whose cases appeared to be the easiest to resolve, were ushered into the registrar first. Once inside, the parents were faced with two long desks, arranged in a 'T' pattern. The registrar sat in the middle of the head of the 'T' and the legal advisors with their clients down each side of the tail of the 'T' facing each other. Usually the legal advisors sat nearest the registrar.

In the six cases observed, the legal advisors and the registrar did most of the talking to isolate the issues in contention. In all cases the registrar encouraged the disputants to participate in the discussions. In spite of this, most of the communication

200 M. Murch et. al. (1989): 57-62 and Newcastle Report (1989): 299-304.

was between the registrar and the lawyers. The court-welfare officers did not become actively involved in the process at this point. They sat to one side but were in the room if needed or if they wished to ask a question. The Wandsworth County Court registrars regarded this part of the in-court mediation process as being preliminary to mediation, as merely setting the stage:

> My job is to open up what the issues are - to make sure that the parties understand ... that they have got to be involved in the decision making process ... We want them to get involved and we don't want them to simply do it through their lawyers ... What you have seen here this morning is really the initiation of conciliation. I don't feel it is my job as a registrar ... to actually take part in the conciliation. (registrar)

The Newcastle Report found that most judges and registrars view their own role during in-court mediation as setting the scene, rather than as co-mediators.[201] This was usually also the case during the in-court mediation sessions in Greater London, at least during the initial stages of the in-court mediation process. As we have seen, however, a substantial minority of the registrars became actively involved in settlement seeking later in the process, if the court-welfare officers were unsuccessful in the private sessions.

At the end of the five to ten minute preliminary process before the registrar, the disputants were normally invited to speak privately to the court-welfare officer. In the other courts the private meetings with court-welfare officers were for the purpose of seeing if the matters still in dispute could be resolved. In this court the meetings were often held merely for the purpose of gaining the disputants' agreement to go to Balham's offices for family work/'mediation' sessions:

> [*So after the in-court conciliation sessions the registrar will ask them if they consent to the same person who saw them during in-court conciliation conducting the court-welfare report and then you continue to work with them?*] Very little of our work comes to us that way. It is only a small number of cases that come that way. If some work is done at the court and then a court-welfare report is requested, the families are given a choice of whether someone else would do it. It happens so rarely. Most of our cases arise as requests for reports from judges, magistrates or from referrals by solicitors, self referrals or they have appeared in front of the registrar and no work had been done at the court. We say, "there is not

201 (1989): 93.

> much point in us talking here, lets talk at the office." So it would be quite unusual for us to do ['mediation'] work at the court and then come here [to prepare the court-welfare report]. (court-welfare officer)
>
> We now have to respect the presidents' direction.[202] So now if we think conciliation will fail [not result in an immediate agreement] we tend to order a court-welfare report rather than attempt a conciliation. They then go along to see the court-welfare officer and exactly the same procedure is followed. If it is sorted out, well and good. There is no report except to say that the parties have agreed. If not then there is a report outlining the problems on both sides ... Or if the parties have seen a court-welfare officer voluntarily and then a court-welfare report is requested we will give them [the parties] a choice as to whether we do the report or whether it will go out somewhere else. Normally the answer is to go off and make an appointment [for family work at the court-welfare offices] because it is going to take a long process and time is of the essence. We have changed our procedure somewhat. Now we do send more of the couples down for rather fuller family counselling rather than trying to do it in the precincts of the court. (registrar)

Five of the six cases I observed in this court resulted in the disputants agreeing to attend, or in indefinite adjournments with court encouragement to attend, further sessions at Balham offices. The other case had already been settled by the lawyers.

The fact that a great deal of effort was made at Wandsworth County Court to get the clients to agree to the use of Balham's services voluntarily did not mean, however, that participation was always voluntary:

> In the cases this morning we managed to do it all by persuasion ... Where people simply won't budge I order a welfare report saying that the welfare officer is now required to report back to the judge, usually the judge, about this particular situation and you jolly well have to go down and see the court welfare officers. We try and avoid it if we can but I am quite prepared to do that and in fact with some people it works ... There is a terrible theory around that unless conciliation is purely voluntary, it won't work. Ideally it should be voluntary ... but in the end I am not persuaded ... I don't think it makes a vast amount of difference really. (registrar)

It is doubtful this service's combination of court-welfare and 'mediation' was affected by the National Association of Probation Officers' (NAPO's) 1990 policy document.[203] That document states that conciliation meetings are confidential and

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202 See footnote 184. For articles and comments opposing divisions between mediation and court-welfare reports, see: M. Day, A. Jones and C. Owen (1984); National Association of Probation Officers (1984); D. Price, letter (1987); D. Price and Handley (1989); D. Price, M. Bilmes and M. Day (1985) 231; J. Pugsley et. al. (1986); J. Pugsley and M. Wilkinson (1984).

203 NAPO (1990): 86.

privileged and separate from welfare reports. Balham will argue that it does not provide mediation or conciliation, and that the service it provides falls under paragraph 4.6. Paragraph 4.6 excludes from the definition of 'conciliation', non-privileged discussions aimed at dispute resolution, conducted off court premises. The policy document states that officers engaging in paragraph 4.6 services may go on to write court-welfare reports. Balham did not offer disputants confidentiality.

The registrars and court-welfare officers working in the Wandsworth County Court felt that most of the cases involving disputes over children coming before the court did not arise from concerns about the welfare of children, but from the turmoil of the parents. They also believed that the court was being saddled with the cases the lawyers were unable to settle by normal dispute-resolution methods. These understandings, combined with fact that the officers in the service were adverse to investigative court-welfare reports, for example:

> [We have] first and foremost a deep seated, sincere belief . . that the majority of parents are quite competent and quite able to make decisions about their own children, . . that the best interests of children lie in agreement between parents and not in decisions of judges and welfare officers; that the welfare of children in this society can best be met by helping the parents of the children to take up their responsibilities (court-welfare officer);

lead this court-welfare team to abandon investigation and dispute-resolution in favour of a therapeutic model:

> If you don't address the relationship, you are not going to solve the problem. It is fine when it [dispute resolution] works but there are a percentage of families [for whom] it won't work because the cause the dispute is rooted in the dynamics of the family and the relationship and that is not looked at in dispute resolution. [*Are most of your problems family dynamic problems?*] Yes. ... Where it is a case of well you give a bit, I will give a bit - the solicitors will have it worked out because most of our local solicitors think conciliation. (court-welfare officer)

Balham applied the same therapeutic methods to all its work. If the courts asked the service to provide a welfare investigation or mediation, essentially the same procedures

were followed except that there would not normally be a report to the court at the end of sessions entered on a voluntary basis:

> If they come for a welfare report we have to do that report whether they reach an agreement or not. So the report will either be saying, "Mrs. and Mr. so and so met with us on three occasions and they worked very hard at the issues involved and they have agreed that it is in the best interests of the children that x, y and z", and the court will rubber stamp that or if they are still in dispute the report will be setting out really both sides of the dispute and will be providing the court with some information about why they are in dispute: comments about the system, what ... games they are playing, attitudes they have and what they are getting out of playing the disputes as they are and something about the emotional context of the child: where the child fits in and what is going on for the child ... If there is an agreement we just set that out in the report and the court can just make a consent order. If it is a voluntary session and they haven't come from the court then we don't do anything: we pat them on the back and say, "you have done very well." (court-welfare officer)

Balham limited its services to child and relationship issues. Property and financial matters, although recognized to be related, were not discussed:

> [There is] no thought of going into that. There is no getting around the fact that we are court-welfare officers and our only reason for involvement is for the children and so it would not be appropriate within our statutory functions to go into property and financial issues. Secondly there are very skilled people around who are much more skilled at dealing with property and financial issues than social workers are. (court-welfare officer)

As we have previously mentioned, Balham encouraged clients to partake of the Family Courts' services without the necessity of court involvement. To this end the service had distributed leaflets advertising their service to solicitors in the area as well as to libraries, Citizens' Advice Bureaus, Probation Offices and Social Service offices. The leaflets being used in 1987 to advertise this service contained information about what this court-welfare team was trying to accomplish: "to work with parents and children towards re-establishing their ability to co-operate and negotiate with one another.."; but contained no information about the methods the service was using to achieve this.[204]

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204 Family Courts Service, green public information pamphlet in use in 1987.

Balham's clients were coming to the service at all stages of the separation and divorce process, from those who were still together and trying to decide whether or not to separate to those who had been divorced for ten years and were still involved with each other in legal disputes. The service reported that it had clients from many socioeconomic and ethnic/cultural backgrounds, although those in the upper socioeconomic echelons were a small minority. Balham provided its services to the public free of charge. Sessions normally lasted one and one-half to two hours and most cases, whether for a court-welfare reports or for 'family work/mediation', were completed in three sessions.

The Balham service shared an outside entrance to its premises with probation services but had separate offices inside the building. Once past the stairs screened with metal mesh, the Family Court's offices were warm and inviting. The office was filled with posters, children's toys, and children's drawings were prominently displayed. The room used for the family interviews was large and reasonably pleasant. The video camera and microphone in the room were unobtrusive. In fact I could not locate them until I asked to have them pointed out to me.

The Family Courts Service's therapeutic way of working was derived from the Milan school of systemic family therapy:[205]

> We had a course run specifically for us by the Family Institute at Cardiff, by a therapist there. We joined together with the Richmond team for that and we have done bits and pieces [of additional training] if there are any conferences but our largest core of training has been from the Family Institute and we have had more for a few days since then.[206] They use systemic family therapy. In simple terms family therapists are in two schools: there are the structural family therapists who look at the structure of the family and they ... reinforce the parental bonds, change the structure of the family unit [when] alliances have gone out of gear; and systemic family therapists who look at the interaction and look at the family as a system where any change in one part has reverberations on

205 Some theoreticians place Milan in the 'strategic' school of family therapy. It does, however, have systemic roots.

206 The Richmond team being referred to here is comprised of those officers who made up Service #4. The court-welfare officers at Richmond advised me that the training they took with the Balham service in Cardiff was of five days duration.

> the other part. . Obviously within that they divide into millions of different groups. The Milan model is the one which our training has been nearest to ... That was the school that suited our purposes best because it is very time limited. We only have three sessions with families on average so we needed a model which provided us with methods and techniques which provided us with a lot of information very quickly ... because divorce and separation are times of crisis for people. They don't want to be in therapy for years and years. It is a time when things happen very quickly. (court-welfare officer)

Balham was more concerned with the long term functioning of families than they were with resolving specific disputes:

> The major objective is . . to bring about sufficient change [so that they will] be able to negotiate and co-operate with each other and the end result of that might be an agreement but not necessarily. It is much more about the long term health of the family. (court-welfare officer)

Consequently the dispute itself was seen as a symptom rather than as the problem to be resolved:

> All family therapy tries to understand what it is that is causing the symptomatic behaviour. The family presents a symptom and the therapist tries to understand what is happening to bring that symptom out and then intervenes to try to change things which will enable the symptom to disappear and the symptom in the families that come here is an inability to agree about the arrangements for the children ... So it is our job to try to understand what it is that is preventing them from agreeing and that is very often something about the marital relationship: guilt, not letting go, or what we refer to as the non-emotional divorce: that on an emotional level the marriage has not ended. (court-welfare officer)

In 1987 this court-welfare unit worked as a team: one officer in the room with the disputants and the other two members of the team in an adjoining room viewing the interview on a video monitor.[207] The disputants were not asked at the beginning of the sessions if they minded being video recorded but were advised at the end:

> We don't ask them at the beginning whether or not they are agreeable to being recorded because then they are agreeing to something they haven't really been through. We ask them at the end if we can keep it [the video of the session]. Seventy five percent are agreeable. (court-welfare officer)

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207 This is another reason why it would be very difficult for this unit to have (an) other officer(s) conduct the welfare enquiry should there be no agreement in the 'mediation' process. If each family meeting requires a team of officers, it would be very difficult to arrange a whole new troop of officers for each process.

The video recording consent forms used by this service advised the clients that the court-welfare officers often found it helpful to review videos of the sessions in order to gain a better understanding of the family' difficulties and sought their permission to do so. The disputants were further advised on the form that if their permission was not given, the videos would not be kept but would be destroyed. A separate consent was sought to allow the service to keep a video of the session for internal use of the service and for training purposes.

The team members viewing the sessions on the video monitor and the interviewing officer communicated with each other during the interview by telephone. The functions of the viewing team were to safeguard interviewer neutrality and to observe the family dynamics so that the team could devise a hypothesis about what was preventing the family members from being able to negotiate with one other:

> It is quite dangerous to work with families in conflict alone because they are very skilled at drawing people in, getting people on their side ... It is extremely difficult to remain impartial and uninvolved. So the task of the team is two-fold: partly to keep an eye on the dynamics by being one step removed. ... The other task is to keep the worker neutral - if they are getting involved, forming alliances, to drag them back out. [The team] will often phone [the interviewer] during the session to tell the worker to ask a particular question or to give [the parties] a particular message or they will phone to say come out for a minute.[208]

All disputants were seen in the sessions together. Side sessions or private caucuses with individual family members were not normally used. Some of the methods being used by the team were circular questioning (*The worker asks questions arising from information obtained from previous questions. The questions test the workers' hypothesis about the function the problem serves for the family unit. The focuss is on the relationships, communication patterns, and perceptions of reality among family*

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208 By 1988 the service may not have been using the telephone as often as they had in 1987. In the summer of 1988 I was told by one of the officers that the team was trying some of the methods suggested by T. Anderson (1987) 415. T. Anderson recommends (at page 420) that the person interviewing not be interrupted by the viewing team.

members.[209]); paradoxical injunctions (*Essentially this involves telling a family to continue it's symptomatic behaviour.*[210] *An example might be to tell parents to continue fighting with each other in front of the children. The hope is that the family will refuse to carry out the injunction. If they do refuse, they will be helping themselves with the problem. If they do as the therapist asks, they will at least be following the therapist's direction.*); and the setting of tasks between sessions:

> For instance [an example of the tasks we might set]: "we would like you to meet to talk about what you are going to tell the little girl about her parentage when she is sixteen ... if you decide she isn't going to see her dad again" ... which is a covert message. We don't want to know the results of that discussion but we want them to start thinking about the realities of what you say to a sixteen year old girl who has not seen her dad for fourteen years. And sometimes we get crazier ... for instance we had one couple where punishment was a very big theme ... It was clear that neither felt the other had been punished sufficiently and they were obviously using the kids to punish each other. [so we said]: "It is not good to use the kids. We wonder what other weapons you can use. How much more punishment do you think he needs? When will he have served his sentence?" So we devised for them a water pistol fight in the park so they could have their fight without using the kids. Their task was to go to Woolworth's and to buy their water pistols and to have a duel in the park . . . [*Did it help?*] I can't remember. I think they started to see the ridiculous side of it. (court-welfare officer)

> The other thing about the method is that ... we quite often give people an intervention at a covert level, almost a subconscious message to take away with them ... We tend to introduce change more covertly so they see themselves doing it: more in spite of us than because of us. (court-welfare officer)

The intention is to challenge the family's perception of the problem thereby making it susceptible to change.

During the 'family work' or 'mediation' sessions the workers tried to gain an understanding of the family's interactions, relationships, and perceptions of reality, so that they could form and later present to the family a hypothesis about the function of the dispute for the family unit (system). Theoretically acceptance or an understanding of that hypothesis would shake the family and its members from their entrenched

209 T. Anderson (1987): 418; J. Burnham and H. Queenie (1988): 58, 60; D. Campbell and R. Draper (1985): 2. For some examples, see J. Howard and G. Shepherd (1987): 91-92.

210 Burnham and Queenie, (1988): 63; Howard and Shepherd (1987): 49-100.

positions or their inability to change, enabling the family to find its own solutions. The worker is to remain neutral and outside the boundaries of the family's dispute, is not to enter negotiations or to propose solutions. The workers' only concern is to get the family to the point where its members ca begin to co-operate and negotiate. The actual negotiation and the creation of solutions are left to the family. Theoretically if the family accepts the hypothesis presented by the worker, this should free the family system and it's members to cope with their problems without further assistance.[211]

In 1987 Balham usually involved only the parents in the first session. Children, if they were included at all, were seen with their parents later in the process:

> We usually start off with the parents - unless the children are older: thirteen or so who very clearly need to make their thoughts and feelings known. Then we might invite them to the first meeting but if they are younger it is just the parents. Then there is no hard and fast rule. Sometimes we don't see the children at all if it is very clearly a dispute that is entirely unfinished business from the marriage ... then we might not see the children at all. In other cases we might bring them is for the second or third meeting. It depends entirely on the situation ... What we frequently find, when we first set up we always had everyone there. We would always invite the children to the first meeting. Nine out of ten times what we were finding was that the issue was not about the children but about their relationship, about the marriage and the children were just in the way. There were very clear areas that we couldn't discuss because the children were there and we were left thinking how we were going to fill the session before giving them another appointment to get them back in without the children. So we switched on that. (court-welfare officer)

By the summer of 1988 Balham's practice had changed to one more consistent with the Milan model.[212] The children were being seen in almost all cases at some point in the

211 Anderson (1988) 417; Burnham and Queenie (1988): 51; D. Campbell, P. Reder, R. Draper, D. Pollard (1983): 4, 25; G. Cecchin (1987): 412; L. MacKinnon (1984): 103. See also the references in footnote 212 and 213. For further discussion of this theory and its' relationship to mediation, see chapters 12.

212 Family systems theory postulates that all members of the family unit are vital to an understanding of family problems. This is due to a theoretical abandonment of linear cause and effect: all parts of the family are both acting and reacting to the system, other systems and to each other all at the same time. It is therefore not possible to assist the unit without having all the pieces. The Milan school carries this even further. This theory abandons the assumptions most of us make about family hierarchies and roles and views each family member as being equal in influence and power. Theoretically this should prevent the therapist from separating 'parental' from 'child' problems. Adherence to the Milan model necessitates the participation of children. References: L. MacKinnon (1984): 100; F. Martin (1985): 12; M. S. Palazzoli, L. Boscolo; G. Cecchin, G. Prata (1980): 5, 12.

process and increasingly they were being invited to attend the first session and throughout the process.

The Balham team did not use trial or time-limited agreements believing they detracted from a proper emphasis on parental responsibility. The service was claiming a high rate of success: 80-85% agreement, but some caution should be exercised here because the figure was based on the number of cases eventually being fought in the courts:

> We have a 80 to 85% success rate. The number of totally fought cases in this court is minute. (registrar)

We do not know how many of these cases were resolved as a result of Balham's assistance and how many by the lawyers, nor do we know how many were true as opposed to spurious resolutions:

> It [our success rate] is very impressionistic. We don't have the facilities to do research . . . We don't get instant or quite often any feedback. All we will know is if they appear in the court at a later stage. (court-welfare officer)[213]

During the course of my interviews with mediators in Greater London in 1987, I found that there was considerable controversy about the Milan way of working.[214] While some authors within the probation service were advocating the adoption of the model throughout the whole of the court welfare service,[215] some of the practising court-welfare officers in Greater London referred to Milan as "unethical, immoral and usually done badly".[216] Hence the need for an independent longitudinal consumer evaluation of this service. One hopes that we might see some solid

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213 The fact that people do not reappear in the process may, in fact, indicate failure instead of success. D. Howe (1989) found that 71% of the families starting family therapy in the service he was studying did not complete the process, usually because they did not find the process helpful.

214 See Chapters 6 and 12.

215 Smith (1982): 9; NAPO (1984), (1990); Gray Hancock, Hutchings (1987): 15. NAPO's 1990 document appears to endorse FCS's way of working. Thus the primary role of the court-welfare officer is stated to be that of assisting "family members to re-establish their ability to negotiate with each other".

216 Quote from a court-welfare officer/conciliator in Greater London about the use of paradoxical injunctions. For discussion of mediator opinion about the Milan model, see Chapters 6 and 12.

comparative research prior to the wholesale adoption of any particular model for welfare enquiries or for mediation services by the legal system.

A word of caution: one problem researchers will face in any attempt to evaluate a service using a Milan model is that theoretically the approach negates the validity of consumer views: [217]

> It would need to be done longitudinally. What criteria would you use to measure success anyway? We are not in the business of agreements ... The major objective is ... to bring about sufficient change for them to be able to negotiate and co-operate ... It is more about the long term health of the family. The other thing about the method is that indications of change quite often aren't apparent immediately as we quite often give people an intervention at a covert level, almost a subconscious message, to take away with them. When parents come back and say thank you very much, we regard that as a negative thing rather than a positive response because our whole ethos is to get families to take responsibility for themselves and not really to see us as responsible for the change or for helping them in any way. We tend to introduce change more covertly so that they see it as doing it themselves: more in spite of us than because of us. Here we accept that people are not going to say "thank-you". You get your positive support from your colleagues, not from your clients. (court-welfare officer)

Therefore any consumer study will have to be longitudinal, will have to use objective tools designed to measure the families' ability to resolve its own problems before and after the process, in addition to looking at consumers' subjective accounts of the process.

In 1988 Balham reported that it was continuing to practice in essentially the same way as it had in 1987, except that children were increasingly being including early and throughout the process, and the service had expanded its repertoire of strategic interventions. It appears, from an article written by the officers of this unit together with those of a newly established court-welfare unit in Inner London at Whitechaple, that these units may now be including 'networking'[218] in 'family work'. 'Networking'

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217 G. Barnes (1984): 112; J. Burnham and H. Quennie (1988): 67; D. Campbell and R. Draper (1985): xv, 1, 6; L. MacKinnon (1985): 104-5; F. Martin (1985): 17; M. S. Palazzoli, L. Boscolo, et. al. (1980): 15.

218 S. Banfield, M. Day, D. Geliot, R. Hall, D. Reaside, R. Thomas, L. Tuhill, M. Briant, S. Grealish, J. Milton, C. Renouf, D. Shefras, and R. Todd (1989): 201.

means that other professionals and other members of the community will now be added to the meetings. While theoretically it might be desirable to have a team of professionals assisting a family with its' problems and to have additional support provided to the family from within its own community, one wonders what this does to a family's right to determine it's own destiny. One wonders also about a family's right to privacy and confidentiality.

Service #17 the Conciliation Services of the Institute of Family Therapy[219]

We turn now to the mediation service offered by the Institute of Family Therapy. Although this service hoped to resolve legal disputes, the methods it used were drawn from family therapy and not from the dispute or conflict resolution fields. Consequently, for our purposes, the Institute of Family Therapy's mediation service (IFT) has been classified as therapeutic.

The Institute of Family Therapy (IFT) began offering mediation in 1983. Mediation was provided under the auspices of IFT but as a separate service. Because the service was connected to the Institute, it did not have a cross-disciplinary management committee. This prevented it from becoming a full member of the National Family Conciliation Council (NFCC).[220] IFT was, however, an associate member and attempted to follow NFCC mediation guidelines.

The Institute of Family Therapy was primarily involved in family therapy, both practice and teaching. It offered a variety of courses to professionals on therapeutic methods to help families with various problems, for example: bereavement, sexual abuse, mental handicaps, problems faced during a child's adolescence. Divorce

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219 The following information is taken from in-depth interviews with the four mediators associated with this programme, observation of one mediation session in progress, observation of a video of another mediation session with another family, and from public information about the agency. The information was collected in 1987 and updated in the summer of 1988.

220 By the end of 1989, this service had become a fully affiliated: NFCC Newsletter (December 1989): 12.

and separation were among these.[221] The Institute also offered a three year, part-time course in family therapy.[222] On occasion the Institute had also offered courses in mediation.[223] The Institute's 1986/7 teaching events pamphlet listed a ten session course on mediation for solicitors[224] but the course was cancelled due to inadequate demand. Most of the courses offered by the Institute, including the courses on mediation[225] emphasized a family systems approach to problem solving.[226]

IFT charged families for mediation on a sliding scale, depending on income. In 1987 the lowest charge was 1.00 per session for those on social assistance and earning under 3999 per year. At the upper end of the scale, those earning in excess of 30,000 per year were charged fees of 50 per session and upwards.[227]

IFT's mediation cases came mainly from solicitors. The mediators' comments suggested that many of the cases being referred to the service involved psychiatric or psychological problems extending beyond the trauma and difficulties normally associated with divorce and separation:

> I think our solicitors ... [named solicitor], for example sends us what he thinks are psychiatric problems and that is partly because he is a super conciliator himself. He is a conciliatory lawyer ... So they refer out those cases which they can't handle. My guess is it is like counsellors referring to psychoanalysts. (conciliator)
>
> One of them referred a case. The wife had been admitted to a mental hospital ... She decided not to go back and the husband couldn't accept it. The solicitors couldn't do anything with it. (conciliator)

In 1986 the Institute saw 201 families. Thirty four of these families came for mediation. IFT reported that its mediation clients were sprinkled across the

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221 Institute of Family Therapy, *Teaching Events 1986/7*, pamphlet.

222 See, W. Dryden and P. Brown (1985): 322 for a survey of the marital therapy training programmes offered by IFT, the Institute of Marital Studies, and the National Marriage Guidance Council. Programmes at the Westminster Pastoral Foundation and the Family Institute at Cardiff are also mentioned.

223 G. Davis (1983b): 11.

224 IFT, *Teaching Events*.

225 G. Davis (1983b)

226 This was also true of the training programme for family therapists, see: Dryden and Brown (1985).

227 This information was provided to me by one of Institute's secretaries.

socioeconomic spectrum but were concentrated in the middle to upper levels of affluence. Not many of IFT's clients came from varied ethnic and racial communities although the service expressed an interest in developing experience in this area.

Mediation was provided one afternoon per week between the hours of 3 o'clock and 6:30 in the afternoon. By the summer of 1988 IFT also mediated one evening each week. IFT had several rooms which could be used for mediation. The rooms being used when I observed a mediation session at this service were located on the ground floor, immediately to the left of the street entrance. These rooms consisted of an interview room where one (or sometimes two) mediators interviewed the disputants and a viewing room to enable the other member(s) of the mediation team to view the sessions. Neither room contained a window to the outside. The rooms were adjacent and joined by a large one-way window which took up most of the wall. The interview room was fairly large but bare and sterile. In addition to chairs, it contained only a telephone on a small table and a video camera.

All of IFT's mediators were family therapists. Perhaps this is the reason they combined dispute resolution:

> The conciliator is offering a neutral space to negotiate. ... It gives people the ability to deal with issues without perhaps losing face, to look at constructive alternatives with somebody who is on everybody's side. (conciliator)

with a therapeutic objective:

> [*Who or what do you see as the client or focus of your mediation work?*] The relationship of the couple. How we can help them give up their husband and wife relationship . . yet hold onto or even build in some cases, a co-parental relationship. (conciliator)

> [*What do you see as the primary goal of mediation?*] The primary goal is to enable the couple to change sufficiently to wish to reach some agreement, so that they can begin to work co-operatively. I don't think it is reaching a global experience. Obviously we are aiming to reach agreements but partial agreements give them a new experience. Number two it is to change their relationship. If they never come to conciliation they tend to get stuck in a bitter dispute and they never get the chance to relearn the etiquette that may be imperative for their new relationship ... three, as far as I am concerned, is to try to restructure the parenting

> relationship so that it is workable, so that it does not get detoured through the children. (conciliator)

Most of the mediation clients coming to this service wanted help with conflicts over children or the decision to divorce:

> Problems relating to children are the ones that tend to come here plus couples where one couple wants out and the other doesn't or they don't know. (conciliator)

> We have a lot of couples who come to us when they aren't sure whether or not their marriage is over. (conciliator)

If clients decided to try a reconciliation, they were normally referred to another branch of the service for reconciliation assistance.

IFT did engage in global mediation on occasion, but the mediators said they only did so when the financial and property issues were connected to disputes about the children, and then only with the consent of the solicitors involved and only in general terms:

> [*Do you handle property and financial issues?*] When it comes up in a child session and it is blocked or wound up with property and finance then we will say to them, "It might be helpful if you rang your solicitors to see if they mind if we discuss the property and finance in global terms." Usually the solicitors agree and then we will do mediation on those issues with their permission, in general terms. (conciliator) [228]

All mediation clients were told immediately of IFT's way of working: that the service used a family systems approach and that the sessions would be observed through a one one-way window or on video by a consulting team. Any couples who objected were not video taped but no choice was offered with respect to the one way mirror and viewing team. Prior to 1987 a single mediator usually worked with the disputants while being viewed by one or two colleagues. With the introduction of a male mediator, the service was increasingly using a male/female team in the room with the disputants viewed by one or more other members of the mediation team.

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228 Interestingly, the one case I observed did not involve children. In spite of this, the disputants were strongly encouraged to solicit their solicitors' consents to the disputants returning to the service for negotiations over their financial and property disputes. I had the impression, however, in spite of this, that most of IFT's mediation cases involved children and relationship problems, not financial and property matters.

The viewing team's purpose was described to me this way:

> We can see their [the disputants'] interaction with the conciliator and we can help if the conciliators are sucked into the conflict. We often make suggestions of compromises and ways of intervening ... It really does help the couple for someone to come in and say, the team says this. You can send in a message which is outside the heat of the room ... It gives another perspective to them. (conciliator)

Normally when the mediator(s) decided to consult the viewing team, they did this by calling for a break in the session and then by going into the other viewing room to talk to the other members of the team:

> Now we tend to work with one member seeing the couple and they take what we call time out which is about one-half way through the session. We excuse ourselves from the couple and them prepare a hypothesis about what we think is the difficulty. So we use a lot of family therapy skills but it is not therapy and we make that very clear. (conciliator)

Normally disputants started mediation sessions together, although there were rare exceptions:

> We aim to see them together if we possibly can and so usually that means quite a lot of negotiation by phone. If we fail then we may see someone on their own. If we do that then we will also see the other one separately before we see them together but the aim is to see them together ... Normally they do come in together because we are very insistent. (conciliator)

This service included children fairly often but only with the permission of both parents:

> We always talk to them about the children and we always tell them we are quite prepared to talk to the children ... If the couple do not take up our offer to see the children, then we leave it. We don't insist upon it. Some services do. I think that negates the principle of couples' own self determination. But if during the course of the session, we have worries about the children, then we will urge them to bring them in. We accept the couple's decision not to bring the children unless we are concerned about them and we say that. If we are worried and they still refuse, we have to accept that and that is very difficult for us, particularly with the knowledge we have about child abuse. (conciliator)

The mediators had changed from a previous practice of starting the sessions with the whole family together:

> We used to see families all together at the beginning - or try to. Now we don't but if they bring them, we won't reject them. (conciliator)

to one of including children later in the process:

> I like them brought in after. It is their decision, but very often at some stage in the process ... not for them to make decisions but to understand, to be told, what is going to happen. Many parents haven't told the children that they are going to separate. (conciliator)
>
> My impression is that before you do anything with the children, you've got to sort out the hierarchical structure with the parents. One of the things that can happen in divorce is the parental hierarchy becomes confused ... So I don't bring the children in until I am able to sort out the new hierarchy so the children don't get pulled in having to sort out parental issues, making choices. (conciliator) [229]

Children were not always seen during the process. When they were not, the mediators said they spent time, at the end of the sessions, talking to the parents about how they were going to tell the children about the arrangements they had made. If children were seen, they were usually seen initially with the parents and then sometimes on their own, but always only with the permission of the parents. Sessions usually ended with the whole family together:

> When I see children, I always see them with their parents at least initially and if I get a sense from the parents, depending on the age of the children, that it might be useful to see the children on their own, I ask the parents for their permission ... I always end the session as a four-some and I may, during the sessions where I negotiate with the children, say, "Can you say that to your parents, or would you like me to?" (conciliator)

Like the other mediation services we have examined, this service also breached confidentiality in cases of child abuse:

> If we think a child is being sexually abused, we will say to the parents, "If you are concerned, why haven't you gone to social services?" If we go on being concerned, we will tell them we will have to discuss it with social services. (conciliator)

Sessions normally lasted between one and one and one-half hours and the process was normally completed within six sessions:

> We operate on trying to achieve some degree of agreement within six sessions. If it seems to be getting up to more than that ... then we should be saying to ourselves, you are going into therapy. (conciliator)

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229 This mediator is speaking from a structural family systems perspective which is different from the Milan approach used by the Family Courts Service at Balham. For a brief discussion of the difference, see Chapter 12. The speaker is talking about helping disputing parents to separate parental from spousal and child roles before bringing children into the sessions.

When the service was contacted again in the summer of 1988, they reported that their mediation team was unchanged, and that they continued practice mediation from a family perspective in the same way. The only change reported was that IFT had set up an advisory committee to look at the possibility of becoming fully affiliated to the National Family Conciliation Council. IFT is now fully affiliated with NFCC.[230]

The Institute of Family Therapy was independent of probation services and therefore did not do welfare investigations for the courts.

General Comments about London's Mediation Services

We have now looked at the variety of mediation' services in which the mediators in Greater London were working. Some of these services were trying to change or restructure relationships, others were trying to change family structures and communication patterns. Still others were trying to give children a voice in the separation/divorce process and/or were using the process to protect the rights or interests of children. And still others were protecting disputant autonomy by helping the disputants make their own decisions. Some services were trying to 'cure' families while others were simply providing a structure and forum to enable family members to negotiate with each other.

The services also differed in their approaches to children. They were including them at different ages and stages of development (the earliest age of inclusion ranged from babies to teenage children), at different stages in the process (from the beginning and throughout the process to only at the end to hear the decisions made); and for different reasons (to pressure the parents into making agreements in accordance with their wishes to simply offering them an independent third party to talk to).

The mediation experiences of Greater London's mediators might be expected to colour their views on the education and training needed to perform their work.

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230 National Family Conciliation Council, Newsletter, (December, 1989): 12.

These divisions will be discussed more thoroughly from the point of view of the individual mediators in the forthcoming chapters. In particular the therapeutic/dispute resolution split will reappear time and time again as the mediators discuss the mediation process and the education and training needed to provide it.

APPENDIX A-2

INTERVIEW STRUCTURE

The practitioners were asked to describe their own mediation practices covering topics such as:

- the methods they used to include the parents, i.e., separately or together or one and then the other; the reasons why the parents were included in this way; the advantages and disadvantages and the reasons for any variation in practice

- the number and duration of their mediation sessions

- the practices they used with respect to children in mediation and their perceptions of the advantages and disadvantages of including children

- the types of disputes they covered

- the style of their mediation practise: whether they worked singly, in pairs, or in teams - and their perceptions of the advantages and disadvantages of that style of practice

- the theoretical they approach used, and why they had adopted it: advantages and disadvantages

This general discussion was normally followed by the following questions:

- What do you see as the primary goal of mediation?

- And the role of the mediator within that process?

- What have you found to be the most difficult problems in mediation?[1]

- When, if ever, do you think mediation is inappropriate?

- Who do you see as the client or the focus of mediation?

- Are education and training important or can any caring person provide the service?

- Could you please rank the following attributes in order of their importance to the mediator: personal attributes, or education and knowledge, or skills and techniques?

- What personal attributes do you think are required by a mediator and what attributes are a disadvantage?

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1 I left it open to the practitioners to discuss either or both: their most difficult professional problems or the cases they had found most difficult to mediate.

- Do you think that mediation of financial and property matters should be available to the public? If so, should it be included with child-focussed mediation or should it be kept separate? Why?

I then explored with the practitioners the need for mediators to acquire knowledge of selected subjects. The practitioners were asked to rank the following subjects as 'Essential', 'Helpful' or 'Not Relevant'. They were encouraged to add comments about the importance or lack of importance of each:

(subjects could be changed or added)

LAW:

- Custody and access law
- Divorce law (a general overview of grounds and procedure)
- Maintenance law
- Contract law - or an understanding of the legal implications of family law agreements
- An overview on the law concerning property division on separation and divorce
- Child abuse law
- Adoption law
- Step-parent rights and obligations
- An overview of the division of powers among the Magistrates', County, and the High courts
- An overview of the law with respect to the variation and enforcement of family court orders
- Understanding of the Income tax implications of maintenance payments and property transfers
- The state of the law concerning confidentiality and privilege and mediation
- Overview of orders available to families in crisis situations (injunctions and ouster orders)
- Evidentiary rules
- Inheritance law
- Basic understanding of reciprocal international recognition of court orders in family law and of international child abduction

FINANCE

- Housing costs and values
- valuation methods
- Knowledge of living costs for families of differing standards of living
- Legal obligations for payment of debts and satisfaction of liabilities
- Knowledge of government financial assistance and housing programmes
- Budgeting skills

SOCIAL WORK & PSYCHOLOGY

- Divorce and its psychological effects on family members
- Child psychological development
- Ability to detect mental illness

- Knowledge of and ability to detect marital and sexual problems
- Knowledge of methods to use to communicate with children
- Knowledge of non-verbal communication or body language
- Ability to recognize child behavioral problems
- Ability to treat child behavioral problems
- Understanding of the special needs of disabled children
- Behavioral modification techniques
- Family systems theory
- Psychotherapy
- Ability to detect whether or not a marriage is over
- Ability to evaluate family interaction
- Ability to correct dysfunctional family interaction
- Ability to evaluate family role behavior
- Ability to correct or treat dysfunctional family role behavior

CONFLICT RESOLUTION

- Conflict theory
- Understanding of the other types of dispute resolution (adjudication, arbitration)
- Understanding of the mediation process
- Understanding of the different mediation methods and models in use
- Understanding of the Role divisions among counsellors, therapists, mediators and lawyers
- Interviewing skills and techniques
- Negotiation skills and techniques
- Stress Management skills
- Effective Communication Skills
- Counselling skills
- Communication theory
- Knowing how to rephrase disputants' comments to encouraging resolution
- Knowing when and how to use time in mediation
- Knowing how to correct disputants' communication problems

GENERAL

- Knowledge of community resources for purposes of referral
- Knowledge of family cultural and ethnic differences
- Ethics

After discussing the knowledge and skills needed to do mediation, the mediators were asked:

- for their opinions about the importance or lack of importance of apprenticeship training;
- how they thought mediators of the future should be trained, including who they thought should be allowed into the training programmes, where the training should take place, what training methods should be used, and how long the programmes should be

The mediators were then asked a series of open-ended and general questions:

- Should a person who has already counselled one of the disputants then engage in mediation with both? Why or why not?
- Should an in-court mediator be allowed or required to write a court welfare report for the court at the end of the mediation sessions? Why or why not?
- How do you deal with power imbalances between disputants?
- What do you do if the disputing parents begin to enter an agreement which is unfair for the children?
- Are there any particular techniques you have used or seen others use which are either very helpful or harmful in mediation? If so, what?
- What do you see as the advantages and disadvantages of the traditional adversarial approach to family law?
- What education, training or skills, if any, do you think lawyers have traditionally lacked in dealing with families in legal conflict upon family breakdown?
- How do you think lawyers view mediation?
- What procedures do you use when parents reach agreement?
- Do you think mediation is, will, or should become a profession? Why or why not?
- Why or why don't you think the development of mediation services important?

Finally, in the last part of the interview, the practitioners were asked to comment on the advantages and disadvantages of some of the mediation models in use in London:

- one mediator with the clients; two mediators with the clients; and one mediator with the clients and a team of mediators observing the mediation sessions from behind a one way glass or video link
- In-court and out-of-court mediation services
- Therapeutic and dispute-resolution based services

APPENDIX A-3

Mediator Questionnaire - Covering Letter

Dear Conciliator:

I am enclosing a questionnaire which I would ask you to complete and to return to me in the attached self addressed envelope. I am an MPhil/PhD student at the London School of Economics, studying the education and training of family conflict conciliators in England and in Canada. Too often little attention is paid to the opinions and knowledge of those with practical experience when academic and other decisions are being made. I hope, in my research to remedy that inattention.

The purpose of the enclosed questionnaire is to determine the educational backgrounds of those practicing conciliation in London. The results will produce a picture of the expertise presently available. Many conciliators will also be interviewed concerning the education and training they think is best for training future conciliators. The research should help the teaching institutions and trainers to develop practical and relevent programmes for future training.

The questionnaires will be treated confidentially. No identifying information will be disclosed.

The research and analysis will take several years to complete. If you are interested in the results please feel free to write me at the following address after September 1987:

Linda Neilson
53 Shore Street
Fredericton, New Brunswick
Canada E3B 1R3

Thank you.

Yours sincerely,

Linda C. Neilson

Mediators' Questionnaire

APPENDIX A-4

Covering Letter - SFLA Questionnaire

I am a practising family lawyer from New Brunswick, Canada. I am interested in conciliation and mediation in family law, but concerned because it seems that while everyone is promoting the growth of conciliation and mediation, few are discussing the education and training that conciliators and mediators have or should have.

I am now working on a PhD at the law faculty of the London School of Economics, focusing primarily on this issue. I am nearing completion of my interviews on education and training with all of the in-court and out-of-court conciliators practising in Greater London, but I also need the opinions of family lawyers. In hopes that you will assist me in this project, therefore, I am sending you a questionnaire and self addressed envelope. Please do not be put off by the length of it. The questionnaire is structured so that most questions can be answered by simply ticking the appropriate boxes. It should not take more than a few minutes of your time. I value your opinion whether or not you are in favour of conciliation/mediation by non-lawyers. Because of the numbers of lawyers involved, I regret that I may not be able to meet you personally, but if you have any questions about the questionnaire or would like to discuss this in more detail, please feel free to ring me at the above number.

You will note that your questionnaire has a number. This is so that I may contact those who have not been able to return them. We (lawyers) are notorious for not completing forms. In order to make any statistically valid conclusions, however, I must have most of them returned. If not, the efforts of those who do complete them will be wasted.

I hope to be able to complete my thesis in the fall of 1988. Please indicate on the questionnaire if you are interested in knowing the results.

Thank you very much for your time.

Yours sincerely,

Linda C. Neilson

Solicitors' Questionnaire

APPENDIX A-5

Upgrading Requested During The Interviews

Note: *These requests were not solicited. They were made during a discussion of the importance of selected subjects. Perhaps the practitioners would have added other topics had an express question been asked. I have noted only those subjects requested by four or more practitioners.*

Subject	Number of Practitioners Requesting
- Ethnic and Cultural Knowledge of Families	19
- Negotiation Techniques	14
- Co-working Techniques	12
- International Family Law (enforcement and abduction)	10
- Techniques to Communicate With Children	10
- Detection of Sexual Abuse	10
- Family Law (unspecified)	9
- Custody and Access Law	9
- Conciliation/Mediation Techniques	9
- Education about other mediation models	9
- Knowledge of the Divisions in Jurisdiction and legal powers among the three courts dealing with family law	5
- More knowledge of the government assistance programmes	5
- More knowledge of the law with respect to confidentiality and privilege and their relationships to mediation	5
- More training in conflict management	5
- Property Law	4
- Law Concerning Stepparents	4
- More training in the art of referral	4
- Non-verbal communication or body language	4
- Greater Understanding of the law concerning the variation and enforcement of family law matters	4
- Greater understanding of the other forms of dispute resolution, for example arbitration, bilateral negotiation, adjudication	4

QUESTIONNAIRE

If your answers require more space, please continue overleaf. Any additional comments are welcomed.

1. Please state your name: _____

Please note your name will not be disclosed to anyone else. It is necessary for me to have it in order to connect your answers given here with your comments in oral interviews. It will also enable me to contact you for clarification if I cannot make out your writing. If you are not being orally interviewed, your answers here are important for research purposes: to show how well those who were interviewed represent London court welfare officers as a whole.

2. In what year did you start to use a conciliatory approach in dealing with families in legal conflict concerning children?_____

3. Over the past year, on average, approximately how much time did you spend with families or observing families when they were dealing with custody and or access disputes?
Please answer both a. and b. or include the approximate number of hours for the year in c.

a. Average number of days per month: _____

b. Average number of hours per day: _____

c. Total number of hours last year: _____

4. What is your primary occupation?_____

5. Approximately how many clients did you see last year?
Count each family as one client unless that family was seen in a subsequent series of sessions for new problems, in which case include the family once for each separate series. Do not include people who called for information only.

_____

6. Over the last year how much time, on average, did your team spend on conciliatory sessions with each family from and including the first appointment to and including the final session?
In reaching an average do not include time spent with those families who appeared for an informational session only.

_____hours

7. Please describe, in two or three lines, the method you use most often with families in helping to resolve custody and or access disputes.

8. a. Have you ever helped resolve access or custody disputes using other models or methods?

Yes [ ] No [ ]

b. If so, what other model(s) or method(s) are you familiar with?

c. Which model or method do clients prefer and why?

9. What percentage of your family cases are resolved in the following ways?

a. no agreement: _____%

b. partial agreement: _____%

c. agreement on all matters and no reconciliation: _____%

d. reconciliation: _____%

10. Do you have work experience besides that of being a court welfare officer relevant to conciliatory work with families? If so, please indicate the occupational category(ies), the number of years worked, and information learned which you have found to be helpful: *(maximum three)*

11. What is (are) your highest academic qualification(s)?

12. What was the primary focus of your most recent academic education?

13. Prior to becoming a court welfare officer, did you take training or courses in any of the following areas?
Please put a check mark after the appropriate answer and fill in the approximate number of hours spent on each area with the instructor. Do not include study hours before or after instruction. (It is not expected that everyone will have training in these areas.)

a. effect of marriage breakdown on family members:
Yes[ ] No[ ]_____Hours

b. child psychology: Yes[ ] No[ ]_____Hours

c. family systems theory: Yes[ ] No[ ]_____Hours

d. counselling techniques: Yes[ ] No[ ]_____Hours

e. psychotherapeutic techniques: Yes[ ] No[ ]_____Hours

f. law of spousal and child maintenance:Yes[ ] No[ ]_____Hours

g. law of property division after marriage breakdown:
Yes[ ] No[ ]_____Hours

h. law of custody and access: Yes[ ] No[ ]_____Hours

i. conciliation techniques: Yes[ ] No[ ]_____Hours

j. conciliation apprenticeship with an experienced conciliator:
Yes[ ] No[ ]_____Hours

14. After becoming a court welfare officer, what additional education and training have you had?
Do not include time spent apart from instructor.

a. conciliation apprenticeship:
Yes[ ] No[ ] _____Hours(approx.)

b. lectures and workshops given by experienced conciliators on conciliation techniques:
Yes[ ] No[ ] _____Hours(approx.)

c. lectures given by lawyers on the law of custody and access:
Yes[ ] No[ ] _____Hours(approx.)

d. lectures given by lawyers on spousal and child maintenance after marriage breakdown:
Yes[ ] No[ ] _____Hours(approx.)

e. lectures given by lawyers on property division after marriage breakdown: Yes[ ] No[ ] _____Hours(approx.)

f. lectures and workshops on psychotherapeutic techniques:
Yes[ ] No[ ] _____Hours(approx.)

g. lectures and workshops on step-parents:
Yes[ ] No[ ] _____Hours(approx.)

h. lectures and workshops on marriage breakdown and it's effects on the family:
Yes[ ] No[ ] _____Hours(approx.)

i. lectures and workshops on family systems theory:
Yes[ ] No[ ] _____Hours(approx.)

j. lectures and workshops on counselling techniques:
Yes[ ] No[ ] _____Hours(approx.)

15. If you are presently taking further training, what subjects are included and what is the duration of the course?
If you are not now enrolled in a course, please answer "n/a" for not applicable.

16. Please list the approximate number of books and articles you have read in the following areas to date:

	articles	*books*
a. psychotherapy	_____	_____
b. effect of marriage breakdown on family members	_____	_____
c. child psychological development	_____	_____
d. family systems theory	_____	_____
e. theoretical basis of conflict	_____	_____
f. conciliation techniques	_____	_____
g. advantages and disadvantages of conciliation	_____	
h. law of custody and access	_____	_____
i. law of spousal and child maintenance on marriage breakdown:	_____	_____
j. law of financial and property division on marriage breakdown:	_____	_____

17. Please list any books or articles you have found to be particularly helpful. *(maximum 3)*

18. Are you: Male[ ] Female[ ]

19. What is your age?

a. 60 and over [ ]

b. 50 to 59 [ ]

c. 40 to 49 [ ]

d. 30 to 39 [ ]

e. 20 to 29 [ ]

f. under 20 [ ]

20. Have you ever been married? Yes [ ] No [ ]

21. Have you ever personally experienced divorce? Yes [ ] No [ ]

22. Have you ever had any children? Yes [ ] No [ ]

23. Is the centre where you usually work run by a probation service? Yes [ ] No [ ]

26. Which category best describes the centre where you work most often?

In-court [ ] Out-of-court [ ] Other [ ] *Please specify:*

Thank you for your time.

17. Please list any books or articles you have found to be particularly helpful. *(maximum 3)*

18. Are you: Male[ ] Female[ ]

19. What is your age?

a. 60 and over [ ]

b. 50 to 59 [ ]

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26. Which category best describes the centre where you work most often?

In-court [ ] Out-of-court [ ] Other [ ] *Please specify:*

Thank you for your time.

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Questionnaire

Questionnaire number:_____

Please note that a number has been assigned to your questionnaire so that I may contact you if the questionnaire is not returned. Names will not be disclosed to anyone else and your identity will be protected.

If you wish to make any comments, they will be welcomed. Feel free to continue overleaf.

In this questionnaire the term "mediation" is used where property and financial disputes, as well as disputes concerning children are included in the process. The term "conciliation" is used where the process is limited to disputes concerning the children. No other distinction is intended.

1. Approximately how much of your law practice is devoted to family law?
Please do not include work in the area of juvenile crime. Also please answer this question in terms of your own practice rather than on the basis of that of your firm as a whole.

a. 0-20 % [ ]

b. 21-40% [ ]

c. 41-60% [ ]

d. 61-80% [ ]

e. 81-100% [ ]

2. When did you first begin to practise family law? *year*: _____

3. Approximately what percentage of your family law disputes do you currently settle prior to trial or full court hearing?
Do not include cases settled without your assistance.

a. 0-20 % [ ]

b. 21-40% [ ]

c. 41-60% [ ]

d. 61-80% [ ]

e. 81-100%[ ]

4. Could you please estimate the percentage of your family law work that is devoted to the following matters?
If possible, please answer this question in terms of the whole of your family law practice and not in terms of any particular case.

a. _____% preparing for and engaging in litigation, including:

research and review of the law, preparation of court and other documents for litigation, advising clients on legal rights and obligations, obtaining and clarifying information for the purposes of trial, attendance with counsel in preparation for trial, and attendance in court (including interim hearings and proceedings).

b. _____% non-litigatious aspects of your family law practice, including:

listening to or discussing child and emotional issues with clients, obtaining and clarifying information for the purposes of settlement, negotiating with solicitors and counsel on the other side of the case and with others in an effort to reach settlement, drafting and ammending agreements and consent orders reached by the parties.

TOTAL: 100 %

5. How many family law clients (actual numbers) did you refer to out-of-court conciliation services last year?

A. a. none [ ]

b. 1 to 5 [ ]

c. 6 to 10 [ ]

d. 11 to 15 [ ]

e. 15 to 20 [ ]

f. 21 to 25 [ ]

g. more than 25 [ ]

B. Approximately what percentage of your total family law clients does the above figure represent?

_____%

6. What type of client or case, if any, do you refer to out-of-court conciliation services?

a. [ ] I do not refer any clients to out-of-court conciliation

or

b. I refer clients who..... *(please complete sentence)*

7. Which of the following people, in your opinion, presently have enough education and training to conciliate/mediate the following areas of dispute?
Please tick all groups you feel have adequate training.

a. Definition of access when access in principle has been agreed:

[ ]Social Workers
[ ]Court Welfare Officers
[ ]Marriage Guidance Counsellors
[ ]Psychologists & Psychiatrists
[ ]Registrars
[ ]Religous Advisors
[ ]Solicitors or barristers
[ ]Any caring person
[ ]Accountants
[ ]None of these

b. Custody, care-and-control, and access when all are in dispute:

[ ]Social Workers
[ ]Court Welfare Officers
[ ]Marriage Guidance Counsellors
[ ]Psychologists & Psychiatrists
[ ]Registrars
[ ]Religous Advisors
[ ]Solicitors or barristers
[ ]Any caring person
[ ]Accountants
[ ]None of these

c. Spousal and or child periodic payment issues:

[ ]Social Workers
[ ]Court Welfare Officers
[ ]Marriage Guidance Counsellors
[ ]Psychologists & Psychiatrists
[ ]Registrars
[ ]Religous Advisors
[ ]Solicitors or barristers
[ ]Any caring person
[ ]Accountants
[ ]None of these

d. Property division and financial adjustments following separation and divorce:

[ ]Social Workers
[ ]Court Welfare Officers
[ ]Marriage Guidance Counsellors
[ ]Psychologists & Psychiatrists
[ ]Registrars
[ ]Religous Advisors
[ ]Solicitors or barristers
[ ]Any caring person
[ ]Accountants
[ ]None of these

8. What skills and education, in your opinion, should mediators have if they are to work with property, financial, custody and access issues connected to family breakdown ?

a. They could not do so without being a barrister or a solicitor:

Strongly Agree[ ] Agree[ ] Disagree[ ] Strongly Disagree[ ] Don't know[ ]

b. Subject to the above qualification, if a person is going to mediate property and financial issues as well as custody and access, to what extent would he or she need study and training in the following areas: *Please tick appropriate box.*

	Essential	Very Helpful	Helpful	Marginally Useful	Not Relevant or Unhelpful	Not Known
Child psychology						
Family systems theory						
Psychological effects of parental separation on family members						
Psychotherapy						
Knowledge of community services for referral						
Family ethnic and cultural differences						
Counselling skills						
Non verbal communication or body language						
Dispute resolution techniques						
Conflict theory						

continued next page

	Essential	Very Helpful	Helpful	Marginally Useful	Not Relevant or Unhelpful	Not Known
Child custody and access law						
Child abuse law						
Divorce law (grounds and overview of process)						
Maintenance law						
Law of property division on separation & divorce						
Income tax implications of maintenance and property transfers						
Apprenticeship with an experienced conciliator						

9. What should be the minimum training required of a family conciliator who only deals with child custody, care and control, and access disputes? *(Assume the person has had no previous training in family law or conciliation and assume that the training covers those areas you specified to be essential or very helpful in question 8, including any apprenticeship specified) Please tick the answer which most correctly represents your point of view.*

a. [ ] a three to four-full-day course (18-24 hours)

b. [ ] a three-month course meeting three hours per week (39 hours)

c. [ ] a six-month course meeting three hours per week (approximately 78 hours)

d. [ ] a twelve-month course meeting three hours per week (approximately 120 hours)

e. [ ] a two year course meeting approximately three hours per week

f. [ ] a graduate level one year, full time course only open to graduates of marriage guidance training, law, social work, probation, psychology, or related educational programmes. *(You may delete any categories in this section you wish.)*

g. [ ] Other. *Please specify:*

10. What should be the minimum training required of a mediator to enable him/her to mediate property and financial issues as well as custody and access? *(Assume the person has had no previous training in family law or mediation and assume that the course covers those areas you specified to be essential or very helpful in question 8, including any apprenticeship specified.) Please tick the answer which most correctly represents your point of view.*

a. [ ] a three to four-full-day course (18-24 hours)

b. [ ] a three-month course meeting three hours per week (39 hours)

c. [ ] a six-month course meeting three hours per week (approximately 78 hours)

d. [ ] a twelve-month course meeting three hours per week (approximately 120 hours)

e. [ ] a two year course meeting approximately three hours per week

f. [ ] a graduate level, one-year, full-time course only open to graduates of marriage guidance training, law, social work, probation, psychology or related disciplines *(you may delete any categories in this section you wish.)*

g. [ ] a person cannot do so without a law degree

h. [ ] Other. *Please specify:*

11. What should be the minimum additional training period (including apprenticeship) before a person with a law degree mediates custody, access and property and financial issues?

a. [ ] lawyers should not act as mediators

b. [ ] lawyers should not mediate child custody, care and control and access issues; they should limit their own mediation services to financial and property matters. *(If you tick this answer, please also tick the answer below which is closest to the amount of additional training you think a lawyer should have before mediating property and financial issues.)*

c. [ ] no additional training is needed

d. [ ] a three day workshop (18 hours) covering mediation and the subjects you specified to be very helpful and essential in question 8 above

e. [ ] a three month course meeting three hours per week (or its equivalent in time) covering the same areas as those you specified in question 8 above.

f. [ ] a six month course meeting three hours per week (or its equivalent in time) and covering the same areas as those you specified in question 8 above.

g. [ ] a graduate level, one year, full-time course covering the same areas you specified in question 8 above.

h. [ ] Other: (please specify)

12. Are you interested in providing conciliation or mediation services to the public within your practice of law or within the practice of your law firm in the future (assuming you are able to get the permission of the law society)?

[ ] Definitely not

[ ] Probably not

[ ] Possibly

[ ] Probably

[ ] Definitely

13. If lawyers provide mediation or conciliation services, which of the following areas of dispute should they cover?

[ ] custody and access disputes

[ ] maintenance disputes

[ ] financial and property disputes

[ ] all of the above

14. What is your opinion concerning the need or lack of need for family law mediation/conciliation services in this country? *Please continue overleaf if necessary.*

15. What is your age?

a. 60 and over [ ]

b. 50 to 59 [ ]

c. 40 to 49 [ ]

d. 30 to 39 [ ]

e. 20 to 29 [ ]

f. under 20 [ ]

16. What is your sex? Male [ ] Female [ ]

17. Have you ever personally experienced divorce? Yes [ ] No [ ]

18. Have you ever had any children? Yes [ ] No [ ]

Thank you for your time.

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